Supreme Court, U.S.
FILED

98 1812 MAY 6 - 1999

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MIR AIMAL KASI

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

On Petition for a Writ or Certiorari to the

Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Virginia Supreme Court err in ruling that a "person" lacks standing to challenge his seizure by United States officials as unreasonable in violation of the Fourth Amendment when (a) the seizure took place outside the United States, and (b) the person is an alien who has substantial connections with the United States?
2. Does a court within the United States have personal jurisdiction over an alien whose presence was obtained in violation of the mandatory process set forth in an extradition treaty to which the United States is a signatory?
3. Did the Virginia Supreme Court err in refusing to suppress evidence obtained (a) in violation of the consular notification provision of the Vienna Convention on Consular Relations or (b) as the fruit of the violation of an extradition treaty?
4. Under this Court's decision in United States ex rel. Touhy v. Ragen and the doctrine of sovereign immunity, do federal agencies have an absolute right to refuse to comply with subpoenas for exculpatory and mitigating evidence issued by state courts in a criminal case?

TABLE OF CONTENTS

OPINIONS BELOW JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

The Abduction 4

Petitioner's Life in the United States 6

The Proceedings in Virginia 9

REASONS FOR GRANTING THE WRIT 12

I. The Court Should Resolve The Conflict Among Lower Courts As To The Standing Of Aliens To Claim The Protection Of The Fourth Amendment 12

II. This Court Should Address The Question Left Open In Alvarez-Machain As To Whether Violations Of Mandatory Extradition Process In Treaties To Which The United States Is A Party Impair An American Court's Personal Jurisdiction Over Defendants 16

III. The Court Should Correct The Lower Courts' Expansion Of The Rule In Touhy Because That Expansion Deprives Criminal Defendants Of Constitutional Rights To Exculpatory And Mitigating Evidence 21

A. This Court Did Not Create A New Federal Privilege In Touhy 22

B. *In Camera* Review Would Protect Each Party's Interests 26

C. This Case Is An Appropriate Vehicle For The Court To Clarify Its Decision In Touhy 28

CONCLUSION 30

APPENDICES

APPENDIX A

The Opinion of the Virginia Supreme Court in Kasi v. Commonwealth of Virginia 1

APPENDIX B

The Virginia Supreme Court's Denial of Petition for Rehearing 24

APPENDIX C

The Virginia Trial Court's and Sentencing Order 25

APPENDIX D

The Virginia Trial Court's oral findings on Entry of Judgment and Sentencing Order 29

APPENDIX E

The Virginia Trial Court's Denial of Defendant's Motion to Set Aside Verdict and Order a New Trial 36

APPENDIX F

The Virginia Trial Court's Denial of Motion to Reconsider Defendant's Motion To Set Aside Verdict and For a New Trial 38

APPENDIX G

The Virginia Trial Court's Denial of Defendant's Motion to Suppress evidence seized as a result of Defendant's seizure in violation of the Fourth Amendment 39

APPENDIX H

The Virginia Trial Court's oral findings in connection with Defendant's Motion to Suppress 41

APPENDIX I

Further oral findings of the Virginia Trial Court in Support of its Denial of Defendant's Motion to Suppress..... 47

APPENDIX J

Further oral findings of the Virginia Trial Court in Support of its Denial of Defendant's Motion to Suppress..... 50

APPENDIX K

The Virginia Trial Court's Denial of Defendant's Motion to Dismiss for lack of jurisdiction and Denial of Defendant's Motions to Suppress Evidence obtained as a result of the violations of the Extradition Treaty and Vienna Convention..... 53

APPENDIX L

The Virginia Trial Court's oral findings in Support of its Ruling on Defendant's Motion regarding violation of the Extradition Treaty 56

APPENDIX M

The Virginia Trial Court's oral findings in Connection with its Ruling on Defendant's Motions regarding the Vienna Convention..... 58

APPENDIX N

The Virginia Trial Court's Orders on Defendant's Motions to enforce subpoenas served upon the FBI and CIA .. 63

APPENDIX 0

The Virginia Trial Court's oral findings in connection with Defendant's Motions to enforce the subpoenas served upon FBI and CIA 66

APPENDIX P

The Virginia Trial Court's Rule To Show with respect to the CIA 68

APPENDIX Q

The Virginia Trial Court's Rule to Show Cause with respect to the FBI 69

APPENDIX R

Extradition Treaty of 1931, 47 Stat. 2122 (1931) 71

APPENDIX S

Extradition Act, Act XXI of 1972 of the Republic of Pakistan, The Pakistan Code, Volume XVIII 87

APPENDIX T

Vienna Convention on Consular Relations, 21 U.S.T. 77 (1963) 100

APPENDIX U

28 C.F.R. §§ 16.21-16.29 103

APPENDIX V

32 C.F.R., §§ 1905.1-1905.4 116

APPENDIX W

Testimony of FBI Agent Bradley J. Garrett 122

APPENDIX X

Transcript of hearing in Virginia Trial Court on Defendant's Motion to Suppress Evidence seized in violation of the Fourth Amendment 200

APPENDIX Y

Transcript of evidentiary hearing in Virginia Trial Court on Defendant's standing to assert the Fourteenth Amendment 241

APPENDIX Z

Motion To Suppress Evidence and Memorandum of Points and Authorities in Support Thereof..... 324

APPENDIX AA

Commonwealth of Virginia's Response to Motions to Suppress..... 330

APPENDIX BB

Transcript of hearing in Virginia Trial Court on Defendant's Motion regarding the Extradition Treaty 336

APPENDIX CC

Transcript of hearing in Virginia Trial Court on Defendant's Motion regarding the Vienna Convention..... 345

APPENDIX DD

Transcript of hearing in Virginia Trial Court on Defendant's Motion to enforce subpoenas served to the FBI and CIA 362

APPENDIX EE

Defendant's Motion for Order to Show Cause with regard to the CIA's failure to comply with a subpoena and Affidavit in support Thereof 386

APPENDIX FF

Defendant's Motion for Order to Show Cause with regard to the FBI's failure to comply with a subpoena and Affidavit in support Thereof 390

APPENDIX GG

Memorandum in Support of Defendant's Motions for Order to Show Cause 394

APPENDIX HH

CIA's Response to the Rule to Show Cause 399

APPENDIX II

FBI's Response to the Rule to Show Cause 414

APPENDIX JJ

Executed Bench Warrant for Petitioner 423

APPENDIX KK

Testimony of Mirwais Kasi 425

APPENDIX LL

Robert O'Harrow, Jr., *Suspect in CIA Slayings is Returned to U.S.*, WASHINGTON POST, June 18, 1997, at A1, A10 468

APPENDIX MM

Thomas A. Lippman, *2 Governments Cloak Details of the Capture*, WASHINGTON POST, June 19, 1997 at A10, A11 477

APPENDIX NN

David B. Ottaway, *Suspect's Moves, Motive Remain Mysterious: Kansi Left Life of Privilege to Move to U.S.*, WASHINGTON POST, June 19, 1997, at A12, A13 482

TABLE OF AUTHORITIES

CASES	PAGE NUMBER
Alexander v. Texas, 450 S.W.2d 70 (Tex. Crim. App. 1970)	24
Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989)	23
Brady v. Maryland, 373 U.S. 83 (1963)	27
Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998), cert. denied, 523 U.S. 371 (1998)	20
Buford v. Georgia, 282 S.E.2d 134 (Ga. Ct. App. 1981)	25
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	24
Commonwealth of Pennsylvania v. Smith, 208 A.2d 229 (Pa. 1965)	25, 27, 28, 29
Connaught Labs., Inc. v. SmithKline Beecham, P.L.C., 7 F. Supp.2d 477 (D.Del. 1998), appeal dismissed, 165 F.3d 1368 (Fed.Cir. 1999)	27
Dugan v. Rank, 372 U.S. 609 (1962)	24
Edwards v. United States Dep't of Justice, 43 F.3d 312 (7th Cir. 1994)	23
Elson v. Brown, 436 P.2d 12 (Nev. 1967)	26
Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774 (9th Cir.)	27
Ferrell v. Yarberry, 848 F. Supp. 121 (E.D. Ark. 1994)	23

Frisbee v. Collins, 342 U.S. 519 (1952) 19

Houston Business Journal, Inc. v. Office of Comptroller of Currency, U.S. Dep't of Treasury, 86 F.3d 1208 (D.C. Cir. 1996) 23

In re Gray, 1998 U.S. App. LEXIS 25779(10th Cir. 1998) 24

In re Pratt, 170 Cal.Rptr. 80 (Cal.Ct.App. 1980) 24

Ker v. Illinois, 119 U.S. 436 19

Kyles v. Whitley, 514 U.S. 419 (1995) 29

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 23, 24

Maddox v. Williams, 855 F. Supp. 406 (D.D.C. 1994), affirmed, 62 F.3d 408 (1995) 23

Commonwealth of Massachusetts v. Manning, 359 N.E.2d 51 (Mass. App. Ct. 1977), reversed, 367 N.E.2d 635 (1977) 24

McClure v. United States, 1995 WL 299849(9th Cir. 1995) ... 24

National Labor Relations Board v. Capitol Fish Co., 294 F.2d 868 (5th Cir. 1961) 27

Nebraska v. Rice, 335 N.W.2d 269 (Neb. 1983) 24

New York v. Heller, 483 N.Y.S.2d 540, 126 Misc.2d 575 (NY. Sup. Ct. 1984) 25

New York v. Kronberg, 672 N.Y.S.2d 63, 243 A.D.2d 132 (N.Y. App. Div. 1998), appeal denied, 678 N.Y.S.2d 27 (1998) 24

New York v. Santos, 368 N.Y.S.2d 130
(N.Y. Sup. Ct. 1975) 26
Ohio v. Lanci, 1980 Ohio App. LEXIS 12551
(Ohio Ct. App. 1980) 26
Ohio v. O'Neal, 1985 Ohio App. LEXIS 6819
(Ohio Ct. App. 1985) 24
Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 25, 26, 28, 29
Reichmann v. State of Florida, 581 S.2d 133 (Fl. 1991),
cert. denied, 506 U.S. 952 (1992) 13, 14
Roviaro v. United States, 353 U.S. 53 (1957) 25
Smith v. Cromer, 159 F.3d 875 (4th Cir. 1998) 23, 24, 26, 27
Smith v. Pennsylvania, 376 U.S. 354 (1964) 28
State of Florida v. Cohen, 887 F.2d 1451(11th Cir. 1989) 26
State of Louisiana v. Andrews, 250 So. 2d 359 (La. 1971) 24
State of Louisiana v. Parker, 661 So. 2d 603
(La.App. 2 Cir. 1995), appeal denied,
667 So. 2d 1049 (La. 1996) 23
State of Louisiana v. Sparks, 978 F.2d 226 (5th Cir. 1992)..23, 24
Tholen Supply Co. Inc. v. Continental Cas. Co.,
859 F. Supp. 467 (D.Kan. 1994) 23
United States v. Alvarez-Machain,
504 U.S. 655 (1991) 11, 16, 18, 19, 21
United States v. Barona, 56 F.3d 1087 (9th Cir. 1995),
cert. denied, _U.S._, 116 S.Ct. 813 (1996) 13, 14

United States v. Bizzard, 674 F.2d 1382 (11th Cir. 1982),
cert. denied, 459 U.S. 973 (1982) 26
United States v. Cardenas, 9 F.2d 1139 (5th Cir. 1993),
cert. denied, _U.S._, 128 L.E.2d 876 (1994) 15
United States v. Guitterez, 983 F. Supp. 905
(N.D. Cal. 1998) 14, 15, 16
United States v. Juda,
797 F. Supp. 774 (N.D.Cal. 1992)
affirmed, 46 F.3d 961 (9th Cir. 1995) 14
United States v. Matta-Ballesteros,
71 F.3d 754 (9th Cir. 1995), modified, 98 F.3d 1100 (9th
Cir. 1996), cert. denied, 519 U.S. 1118 (1997 20
United States v. Nixon, 418 U.S. 683 (1974)..... 24, 25, 26, 27
United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997),
cert. denied, ____ U.S. ____, 118 S.Ct. 1389
(1998) 20
United States v. Reynolds, 345 U.S. 1 (1953)..... 26
United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998),
cert. denied, _U.S._, 119 S.Ct. 90 (1998)..... 19
United States v. Tehrani, 826 F. Supp. 789 (D.Vt. 1993),
affirmed, 49 F.3d 54 (2nd Cir. 1995)..... 14
United States ex rel. Touhy v. Ragen,
340 U.S. 462 (1951) ..... *passim*

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 10, 13, 14
United States v. Williams,
1999 U.S. App. LEXIS 3843 (4th Cir. 1999) 23, 24
Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 16

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. IV ..... *passim*
U.S. CONST. amend. VI ..... *passim*
U.S. CONST. amend. XIV, § 1 ..... *passim*
U. S. CONST. art. VI, cl. 2 ..... *passim*

INTERNATIONAL LAWS AND TREATIES

Act XXI of 1972 of the Republic of Pakistan,
The Pakistan Code, Volume XVIII 3, 11, 17
Extradition Treaty between the United States and
the Republic of Pakistan, 47 Stat. 2122
(1931) ..... *passim*
Vienna Convention on Consular Relations,
21 U.S.T. 77 (1963) ..... *passim*

STATUTES AND RULES

5 U.S.C. § 301 ..... *passim*
28 C.F.R §§ 16.21-16.29 ..... 3, 22

32 C.F.R. §§1905.1-1905.4 ..... 3, 22
VA. CODE ANN. §§ 19.2-264.2, 19.2-2.264.4(c) 6
VA. CODE ANN. §17-313(C)(2) 11

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of Virginia to review the judgment below.

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 508 S.E.2d 57 and 256 Va. 407, and is located in the Appendix submitted herewith at page 1. The Order denying petitioner's motion for a rehearing is not officially reported. Record Nos. 980797, 980798, Circuit Court No. 791148. A copy of the Order is in the Appendix at page 24.

JURISDICTION

The Final Judgment of the Supreme Court of Virginia was entered on January 8, 1999, after that court denied petitioner's motion for rehearing. This Court granted petitioner's Application for Extension of Time to File Petition for Writ of Certiorari in Application No. A-748 and extended the time for petitioner to file the Petition until May 7, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Extradition Treaty between the United States and the Republic of Pakistan, 47 Stat. 2122 (1931)

The text of the Treaty is set forth in the Appendix at page 71.

Act XXI of 1972 of the Republic of Pakistan, The Pakistan Code, Volume XVIII

The text of the Extradition Act, 1972 is set forth in the Appendix at page 87.

Vienna Convention on Consular Relations, 21 U.S.T. 77 (1963)

The pertinent text from the Vienna Convention is set forth in the Appendix at page 100.

5 U.S.C. § 301

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

28 C.F.R. §§ 16.21-16.29

The text of the Federal Bureau of Investigations' Production and Disclosure in Federal and State Proceedings, 28 C.F.R. §§ 16.21-16.29, is set forth in the Appendix at page 103.

32 C.F.R. §§1905.1-1905.4

The text of the Central Intelligence Agency's Production of Official Records or Disclosure of Official Information in Proceedings Before Federal, State or Local Governmental Entities

of Competent Jurisdiction, 32 C.F.R. §§ 1905.1-1905.4, is set forth in the Appendix at page 116.

STATEMENT OF THE CASE

The Abduction

On June 15, 1997, at four in the morning, four unidentified men wearing native clothing rushed into petitioner's hotel room in Pakistan and, with guns drawn, wrestled petitioner to the ground. Kasi v. Commonwealth of Virginia, 508 S.E.2d 57, 60-61 (Va. 1998), Appendix at 5. The four men handcuffed, gagged, shackled and hooded petitioner, dragged him from the room, and transported him in a vehicle for approximately 45 minutes to an unknown location. Id. at 61, Appendix at 5. While in the vehicle, one of the men identified himself as an agent of the United States Federal Bureau of Investigation ("FBI"). Id.

When the vehicle stopped, the four men grabbed petitioner—still handcuffed, shackled, and hooded—and forced him onto an airplane which flew for approximately an hour to another unknown location. Id.; Appendix at 167-168. After the plane landed, petitioner was kept on the plane for another hour and a half. Appendix at 168. Eventually, petitioner was moved from the plane to yet another vehicle and driven another half hour—still handcuffed, shackled and hooded—to an unidentified facility controlled by Pakistanis. Kasi, 508 S.E.2d at 61, Appendix at 6.

Petitioner was held in a small, barred and locked cell at the facility for the next two days. Id.; Appendix at 171-172. At all times during the two days, petitioner was kept in the cell, handcuffed and under the constant supervision of the FBI agents.

Kasi, 508 S.E.2d at 61, Appendix at 6; Appendix at 172, 173-174. The cell had no windows and there was no way for petitioner to tell time. Appendix at 171. The temperature in the cell was well over eighty degrees, and petitioner had no access to anyone other than FBI agents and the unidentified individuals who delivered petitioner food. Appendix at 173-174, 176.

On June 17, 1997, petitioner was taken from the facility in the custody of the FBI agents and transported to an airfield from which he and the FBI agents were flown on a twelve-hour flight to the United States.[1] Kasi, 508 S.E.2d at 61, Appendix at 6. Upon arrival in the United States, the FBI agents turned petitioner over to Virginia law enforcement authorities who arrested him for the murder of two agents of the Central Intelligence Agency ("CIA") in Virginia on January 25, 1993. Appendix at 423-424.

At no point at or prior to his arrest did the FBI agents or the Virginia authorities tell petitioner that he had the right to contact a representative of the Pakistani consulate. Kasi, 508

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[1] It is believed that the United States negotiated petitioner's release from the facility with those that controlled the facility, and eventually gave those people or their principals money (up to $3.5 million) and/or property in exchange for petitioner's release. Appendix at 470, 475, 479. It is unclear from the record what, if any, connection the people who controlled the facility had with the Federal Government of Pakistan or with Pakistan's foreign affairs personnel. However, the four FBI agents apparently entered Pakistan surreptitiously and did not provide the Federal Government of Pakistan with any documents relating to their entry into, activities in or exit from Pakistan.

S.E.2d at 62, Appendix at 9. In fact, the Commonwealth of Virginia and the petitioner stipulated in the trial court that the petitioner was not informed of his right to contact the consulate until July 3—some two weeks after his arrival in the United States. Id. At no time after the seizure of petitioner did the agents or any official of the United States requisition the Federal Government of Pakistan for the extradition of petitioner from Pakistan, as required by the Pakistani Extradition Act, 1972.[2] Id. That law and the Extradition Treaty it implemented were at all times relevant hereto the supreme law of the United States. U.S. CONST. art. VI, cl. 2.

Petitioner was tried by jury in November 1997 over ten days. Kasi, 508 S.E.2d at 59, Appendix at 2. The jury found petitioner guilty and recommended death based on the "vileness" of the crime.[3] Id. at 59-60, Appendix at 2-3. The trial court, after reviewing a post-sentencing report which did not contain any information from the files of the FBI or CIA as subpoenaed by petitioner, agreed with the jury's determination and sentenced petitioner to death. Id. at 60, Appendix at 3.

Petitioner's Life in the United States

Petitioner is a native and citizen of Pakistan. Kasi, 508 S.E.2d at 61, Appendix at 6. During the Afghanistan War, the CIA, through the ISI, Pakistan's intelligence and national security

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[2] The Commonwealth of Virginia and petitioner stipulated that "the seizure in Pakistan was not made pursuant to any Pakistani paper or document, which would allow him to be seized under the laws of Pakistan." Kasi, 508 S.E.2d at 62, Appendix at 9.

[3] VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4(c).

service, sought the aid and assistance of the petitioner and members of his family, including his father, uncle and other members of his tribe. Appendix at 483. After the war, one of petitioner's family members was killed—the CIA is believed to be responsible. Id.

Sometime in late 1990 or early 1991, petitioner made preparations to move to the United States. Appendix at 280, 460-461. As part of these efforts, petitioner obtained a business visa from United States authorities in Pakistan and secured $100,000 of capital from his share of the family business for use in the United States. Appendix at 280, 461. Petitioner entered the United States in February 1991 on the business visa. Id. at 280. The visa expired on March 30, 1991. Id. at 283. Sometime after March 30, 1991, petitioner secured an amnesty and work permit from the United States Immigration and Natural Services ("INS"), Appendix at 325, and continuously resided at one location in Northern Virginia until January 1993.[4] Kasi, 508 S.E.2d at 59, Appendix at 1; Appendix at 246-247, 251.

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[4] The INS files regarding petitioner's immigration status were reported as lost when petitioner requested them in this case, until an INS employee, called to testify on behalf of the prosecution at the hearing on the Motion to Suppress Evidence secured in violation of the Fourth Amendment, was able to locate copies of a few documents from the files that were important to the Commonwealth's opposition to the Motion. Appendix at 288, 294-295, 298-299. The INS never found the other documents from the file. Petitioner believes that the "missing" documents would show a connection between the CIA's efforts in the Afghanistan War and CIA involvement with the amnesty and work permit issued to petitioner by the INS.

When petitioner first entered the United States, he lived in Virginia and worked occasionally for Ace Movers and Rentals. Appendix at 250-251. In the summer of 1991, petitioner helped a Pakistani friend finance the purchase of a truck for his friend's moving business. Id. at 258-259. Over the next year, petitioner worked with his friend, helped finance the operations, and developed his business skills, such as how to manage and operate a moving business. Id. at 260-261.

Petitioner next entered into a contract to work for Excel Courier, a delivery and transport company in Northern Virginia. During his residency in Virginia, petitioner held a Virginia driver's license, maintained car insurance, and otherwise engaged in activities associated with his living and working in the United States. Kasi, 508 S.E.2d at 59, Appendix at 1-2; Appendix at 269-270. On January 25, 1993, two CIA agents were shot to death near the entrance to the CIA headquarters. Kasi, 508 S.E.2d at 59, Appendix at 1. Other than the statement given by petitioner after he was abducted by the four FBI agents in Pakistan, no direct evidence placed the petitioner at the murder scene. See id. at 61, Appendix at 7.

Between January 1993 and June 1997, the CIA and FBI conducted an extensive investigation into the murders of the two CIA agents, both in the United States and abroad. Id. at 61, Appendix at 6. The federal agents acted as investigators for the Commonwealth attorney for Fairfax County. See id.; Appendix at 423-424. As part of the investigation, the federal agents paid unidentified persons in excess of two million dollars for

information and traveled to multiple countries before tracking petitioner down in Pakistan. Kasi, 508 S.E.2d at 61, Appendix at 6; Appendix at 470, 475, 479.

The Proceedings in Virginia

As part of discovery in the trial court, petitioner caused subpoenas to be served on the FBI and CIA seeking documents concerning him, his family and the killings, including documents relating to the FBI and CIA hunt for petitioner, his capture by the FBI, his family's history with the CIA, the killing of his family member and the CIA's involvement with his amnesty permit issued by the INS. Appendix at 403, 411-413, 421-422. The FBI and CIA refused to produce the requested documents.[5] Id.; Appendix at 399, 402, 414-417. The trial court denied petitioner's requests to enforce the subpoenas and compel the FBI and CIA to produce the documents stating: "I don't find there's any jurisdiction of a state court to hold a federal official in contempt for failing to respond to a state court's subpoena. And for that, and the other reasons stated by [the FBI and CIA's attorney], the rule to show cause is dismissed." Id. at 64, 67. The Supreme Court of Virginia summarily affirmed the trial court's rulings. Kasi, 508 S.E.2d at 60, Appendix at 4, 5.

Prior to trial, petitioner also moved the Court to suppress evidence stemming from the FBI's seizure of him based on the unreasonableness of the seizure. Id. at 63, Appendix at 12;

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[5] Petitioner followed the regulatory procedures established by the FBI and CIA but did not obtain the requested documents for use in this case.

Appendix at 324-329. The trial court, relying on this Court's opinion in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), found that petitioner must prove that he has substantial voluntary contacts with the United States to claim the protections of the Fourth Amendment: "[Petitioner] has to make a prima facie case to show that he is entitled to claim that protection and at least a prima facie case that it was violated." Appendix at 43. After conducting a hearing at which both petitioner and the Commonwealth of Virginia presented testimony, Id. at 241-323, the trial court ruled that petitioner did not have standing to challenge the FBI's seizure of him as unreasonable. Id. at 40, 47-52.

The Supreme Court of Virginia upheld the trial court's ruling. Kasi, 508 S.E.2d at 63, Appendix at 12. Significantly, the Virginia Supreme Court did not assess petitioner's contacts with the United States, but rather reasoned that the Fourth Amendment is inapplicable to federal government conduct towards aliens that takes place outside of the United States.[6] See id.

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[6] The Supreme Court of Virginia reasoned as follows: "In United States v. Verdugo-Urquidez [citation omitted], the Supreme Court held: 'The available historical data show...that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.' The Court also said, 'There is likewise no indication that the Fourth Amendment was understood...to apply to activities of the United States directed against aliens in foreign territory or in international waters. [citation omitted].'" Kasi, 508 S.E.2d at 63, Appendix at 12.

Prior to trial, petitioner also moved to dismiss the charges against him on grounds that the trial court did not have jurisdiction over him. Id. at 62, Appendix at 8-9. In the alternative, petitioner asked that evidence resulting from his abduction from Pakistan in violation of the Extradition Treaty between the United States and Pakistan and the Vienna Convention on Consular Relations be suppressed. Id. at 62, 63-64, Appendix at 8-9.

The trial court denied each of these pretrial motions, Appendix at 54-55, 57, 59-62, and the Virginia Supreme Court affirmed stating that the Court's decision in United States v. Alvarez-Machain, 504 U.S. 655 (1992), controlled and that the Vienna Convention on Consular Relations does not give individuals any legal, enforceable rights. Kasi, 508 S.E.2d at 63, 64, Appendix at 11-12, 13.

The Virginia Supreme Court also conducted a proportionality review of his death sentence mandated by Virginia statute. Id. at 68, Appendix at 22-23; see VA. CODE ANN. §17-313(C)(2). The court upheld petitioner's eligibility for death on the basis of the "vileness" factor. Id., Appendix at 23. The court reviewed the record in the case which did not contain any documents from the CIA or FBI, compared the sentence in Petitioner's case to those imposed for supposedly similar crimes in Virginia, and concluded that the trial court's sentence was "not excessive or disproportionate." Id.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG LOWER COURTS AS TO THE STANDING OF ALIENS TO CLAIM THE PROTECTION OF THE FOURTH AMENDMENT.

In this case, the Supreme Court of Virginia held that petitioner, regardless of his contacts with the United States,[7] lacked standing to claim that his seizure violated the Fourth Amendment because it took place overseas. Kasi, 508 S.E.2d at 63. As a consequence, the Virginia Supreme Court squelched petitioner's Fourth Amendment challenge to the reasonableness of his seizure—a challenge which, based on the facts, would likely have been successful. [8]

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[7] Petitioner legally lived and worked continuously in the United States for nearly two years, had substantial voluntary and legal contacts in the United States and was seized in Pakistan by federal agents based on alleged conduct that occurred exclusively in the United States.

[8] Neither the trial court nor the Supreme Court of Virginia ruled whether the government's seizure of petitioner was reasonable. However, the FBI and CIA officers clearly acted unreasonably when they entered his hotel room at four in the morning without identifying themselves, gained physical control over him through the use of force, molested him, placed a hood over his head, gagged, handcuffed and shackled him, transported him in a van for almost an hour, placed him on a plane for over an hour, placed him in another van for almost an hour, held him in a cell for two days and then flew with him on a twelve hour flight to the United States.

The decision of the Virginia Supreme Court generally follows the decisions of the Fifth Circuit Court of Appeals on the issue of Fourth Amendment standing, but conflicts with decisions of the Ninth Circuit Court of Appeals and the Supreme Court of Florida. Conflict in lower court decisions also exists on the issue of whether an alien bears the burden of proving standing. The Court should grant certiorari to resolve the conflict on these issues of significant constitutional importance.

In United States v. Verdugo-Urquidez, the Court, in a plurality decision, found that a Mexican citizen and resident, who had no substantial voluntary connections with the United States, lacked standing to challenge under the Fourth Amendment the search of his home by agents of the United States government. 494 U.S. 259, 274-275 (1990). The Court ***did not*** rule that the Fourth Amendment is inapplicable to an extraterritorial search or seizure.[9] See United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995), cert. denied, _U.S._, 116 S.Ct. 813 (1996); Reichmann v. State of Florida, 581 So. 2d 133, 138 (Fla. 1991). Nor did this Court rule that only resident aliens are "people" deserving of the protection of the Fourth Amendment. See Verdugo, 494 U.S. at

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[9] Compare Verdugo, 494 U.S. at 270, 274-275 ("he was a citizen and resident of Mexico with no voluntary attachment to the United States, ***and*** the place searched was located in Mexico") (emphasis added) with Verdugo, 494 U.S. at 277, 278 (Kennedy, J., concurring) ("the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a non-resident alien... [i]f the search had occurred in a residence with the United States, I have little doubt that the full protections of the Fourth Amendment would apply").

271-272, 272-273, 279 (Stevens, J., concurring), 282 (Brennan, J., dissent); see also United States v. Guitterez, 983 F.Supp. 905, 915-916 (N.D.Cal. 1998); United States v. Tehrani, 826 F.Supp. 789, 793-794 n.1 (D.Vt. 1993), affirmed, 49 F.3d 54 (2nd Cir. 1995). Indeed, the Court in Verdugo specifically limited its holding to the circumstances of an alien who had no voluntary connection with the United States and whose home was outside the United States and stated that the Fourth Amendment rights of an alien depend on his voluntary contacts with the United States. Verdugo, 494 U.S. at 274-275.

Since the decision in Verdugo, the Supreme Court of Florida has held that aliens can claim the protection of the Fourth Amendment regarding searches conducted by United States government agents abroad. Reichmann v. State of Florida, 581 So. 2d 133, 138 (Fla. 1991). In Reichmann, the Florida Court found that a German citizen and resident who had been legally visiting the United States for less than a month had standing to challenge the search of his property by United States agents in Germany. 581 So. 2d at 138. Similarly, the Ninth Circuit Court of Appeals has held that an alien who had substantial voluntary connections to the United States can challenge United States government searches and seizures abroad. United States v. Juda, 797 F.Supp. 774, 781 (N.D.Cal. 1992) (resident alien has standing to challenge federal government's search and seizure abroad), affirmed, 46 F.3d 961 (9th Cir. 1995); see Barona, 56 F.3d at 1093, 1094 (acknowledging that this question remains undecided and assuming for purposes of the motion that alien had standing to challenge conduct abroad).

To the contrary, the Fifth Circuit Court of Appeals has held that an alien who has substantial voluntary connections to the United States does not have standing to challenge the federal government's conduct abroad. United States v. Cardenas, 9 F.3d 1139, 1157 n.8 (5th Cir. 1993) (resident alien cannot challenge federal government conduct taking place in another country), cert. denied, _U.S._, 128 L.E.2d 876 (1994). Similarly, in this case, the Virginia Supreme Court found that petitioner, despite his residence at one location in the United States for approximately two years, could not assert a Fourth Amendment challenge to his seizure by FBI agents in Pakistan. Kasi, 508 S.E.2d at 63, Appendix at 12.

As to who bears the burden of proof on Fourth Amendment standing, the Virginia trial court found that petitioner bore the burden of proving standing while the Federal District Court for the Northern District of California declined to place a higher burden on a non-citizen defendant moving to suppress evidence resulting from unreasonable United States government conduct. Compare Guitterez, 983 F. Supp. at 916 ("[g]iven the lack of any clear appellate guidance which alters the applicable standard...the court is disinclined to impose a greater burden on this category of criminal defendants as a prerequisite to seeking the shelter of the Fourth Amendment") with Kasi, Appendix at 43 ("[Petitioner] has to make a prima facie case to show that he is entitled to claim [the] protection [of the Fourth Amendment]...").

Had petitioner been prosecuted in the state court in Florida or the federal district court in California, the trial court would have found that petitioner has standing—petitioner lived, worked, held a

driver's license, maintained car insurance, invested in business, and participated in civic and religious activities in the United States as a legal alien for approximately two years, and the incident that gave rise to his seizure occurred in the United States during his legal residence—and proceeded to evaluate the reasonableness of the FBI's seizure. Evaluation of petitioner's seizure would expose its unreasonableness and result in the suppression of petitioner's confession.

The ability to challenge government conduct that violates the Fourth Amendment is crucial to the protection of defendants' interest in privacy and bodily integrity and the prevention of unlawful government conduct. See Guitterez, 983 F.Supp. at 911 (citing Zurcher v. Stanford Daily, 436 U.S. 547, 559 (1978)). The remedy relative to these issues on which the conflict exists—exclusion of the unlawfully obtained evidence—is outcome-determinative and resolution of these conflicts will ensure that similarly situated defendants, including petitioner, are not treated differently solely because of the court in which their cases are heard.

II. THIS COURT SHOULD ADDRESS THE QUESTION LEFT OPEN IN ALVAREZ-MACHAIN AS TO WHETHER VIOLATIONS OF MANDATORY EXTRADITION PROCESS IN TREATIES TO WHICH THE UNITED STATES IS A PARTY IMPAIR AN AMERICAN COURT'S PERSONAL JURISDICTION OVER DEFENDANTS.

Article 8 of the Extradition Treaty between the United States and the Republic of Pakistan provides:

> The extradition of fugitive criminals under the provisions of this Treaty shall be carried out...**in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed**. [emphasis added]. 47 Stat. 2122 (1931), Appendix at 71.

Act XXI of the Republic of Pakistan ("Extradition Act, 1972") implements the Extradition Treaty and sets forth an exclusive extradition procedure. The Pakistan Code, Volume XVIII. Chapter II, Section 6 of Extradition Act, 1972 provides:

> 6. Requisition for surrender of fugitive offender. A requisition for the surrender of a fugitive offender **shall be made** to the Federal Government...[emphasis added]. Appendix at 87.

Article 36(2) of the Vienna Convention on Consular Relations confers a national of a signatory country with the right to be advised that he can communicate with his country's consul without interference immediately upon his detention by agents of a foreign state. 21 U.S.T. 77 (1963), Appendix at 100.

In this case, petitioner was kidnapped by four (4) FBI agents, handcuffed, shackled and hooded, and taken by car and airplane to a facility controlled by Pakistanis. After two days at this facility under continuous supervision by the FBI agents, the petitioner was turned over to the custody of the agents. The agents

took petitioner to an airport from which he and the agents were flown to the United States.

The United States did not make a requisition to the Federal Government of Pakistan or advise him of his right to unfettered contact with his consulate. Kasi, 508 S.E.2d at 62, Appendix at 9. In fact, petitioner was not advised of his right to contact his consulate until the Commonwealth's attorney wrote to the defense counsel fourteen days after his return to the United States. Id.

Despite the lack of the required requisition and the failure to advise petitioner of his rights under the Vienna Convention, the Virginia Supreme Court found that the trial court had personal jurisdiction because of this Court's ruling in United States v. Alvarez-Machain, 504 U.S. 655 (1992). Id. at 63, Appendix at 8. The Virginia Court stated that petitioner's abduction did not violate the Extradition Treaty between the United States and Pakistan, because nothing in the Treaty prohibited the abduction or required that sanctions be imposed for an alleged violation of the Treaty. Id.

The Virginia Supreme Court also found that the Vienna Convention did not require the FBI agents to notify petitioner of his right to contact Pakistani authorities because petitioner was "turned over" to Pakistani authorities and that, as soon as the petitioner was returned to the United States, the prosecutor notified the defense that petitioner had the right to contact the Pakistani consulate. Id. at 64, Appendix at 9.

Both of these findings are erroneous and outcome-determinative. The failure to follow the mandatory extradition

procedure set forth in the Extradition Act, 1972 deprived the Virginia court of personal jurisdiction over petitioner in violation of petitioner's Fourteenth Amendment right to due process.

In Alvarez-Machain, the Court held that the forcible abduction of a Mexican citizen in Mexico at the direction of DEA agents is not prohibited by the Extradition Treaty between Mexico and the United States. 504 U.S. at 670. The Court reasoned that the forcible abduction was permissible because the Extradition Treaty did not provide for a mandatory extradition process or expressly bar kidnapping by government agents. Id. at 666, 669; Ker v. Illinois, 119 U.S. 436 (1886); see also Frisbie v. Collins, 342 U.S. 519 (1952). Unlike the situation in Alvarez-Machain, the Treaty between the United States and Pakistan, implemented by the Extradition Act, 1972, specifically provides for exclusive use of the requisition procedure in the extradition process, especially where officials of both counties are involved in the process.

Since no such requisition was ever made for petitioner after he was held in the facility controlled by the Pakistanis and before he was "turned over" to the custody of the FBI agents, the Virginia Court had no jurisdiction over petitioner. Indeed, the four (4) FBI agents simply ignored the mandatory extradition procedure despite the Extradition Treaty's status as the supreme law of the United States. In essence, the Extradition Act, 1972 provides "the only way by which one country may gain custody of a national of the other country for purposes of prosecution," and the Ker-Frisbie doctrine does not apply. Alvarez-Machain, 504 U.S. at 664; see United States v. Rezaq, 134 F.3d 1121, 1130 (D.C. Cir. 1998), cert.

denied, _U.S._, 119 S.Ct. 90 (1998); United States v. Noriega, 117 F.3d 1206, 1213 (11th Cir. 1997), cert. denied, _ U.S. _, 118 S.Ct. 1389 (1998); United States v. Matta-Ballesteros, 71 F.3d 754, 763 (9th Cir. 1995), modified, 98 F.3d 1100 (9th Cir. 1996), cert. denied, 519 U.S. 1118 (1997).

In stating that no sanctions were required, the Virginia Supreme Court chose to ignore the clear rule of law that, where the trial court lacked personal jurisdiction, the Fourteenth Amendment requires reversal without prejudice and the suppression at any new trial of evidence obtained in the unconstitutional process through which the presence of the defendant was secured.

Furthermore, the Vienna Convention grants an individual the right, when seized by agents of a foreign state, to immediately consult with his own government's consulate. Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring), cert. denied, 523 U.S. 371 (1998). The rationale for this right is evident, i.e., unfettered consultation ensures individual rights and the rule of law. The Virginia Supreme Court is simply in error in ruling that the rationale is satisfied because petitioner was held for two days in a facility controlled by Pakistanis. Kasi, 508 S.E.2d at 64, Appendix at 9. During those days, the FBI agents maintained continuous surveillance of petitioner and did not give petitioner any opportunity to consult, independently or otherwise, with personnel of the foreign office of Pakistan—much less advise him of his right to do so.

The Virginia Supreme Court is plainly wrong in stating that as soon as petitioner returned to the U.S. the defense was

advised that petitioner could contact his consulate. Id. The record clearly shows that such advice was not given until July 3, 1997, some fourteen days after his return and well after petitioner had been subjected to extensive interrogation and had given a statement to one of his abductors.

Neither the United States nor the Republic of Pakistan or any other nation-state with an extradition law compelling a mandatory extradition process or which is a signatory to the Vienna Convention can ignore these laws. They *are* the supreme laws of the United States. U.S. CONST. art. VI, cl. 2. All unlawful attempts to obtain jurisdiction over a person protected by such laws fail and violate the person's Fourteenth Amendment rights. The Court should grant the Petition and clarify its decision in Alvarez-Machain, especially in situations where a foreign state's extradition law provides for an exclusive extradition process.

III. THE COURT SHOULD CORRECT THE LOWER COURTS' EXPANSION OF THE RULE IN TOUHY BECAUSE THAT EXPANSION DEPRIVES CRIMINAL DEFENDANTS OF CONSTITUTIONAL RIGHTS TO EXCULPATORY AND MITIGATING EVIDENCE.

The Virginia courts deprived petitioner of his Sixth Amendment right to compulsory process and his Fourteenth Amendment rights to due process and equal protection when the courts failed to compel the FBI and CIA to produce documents likely to contain exculpatory and mitigating evidence.

The FBI and CIA refused to comply with subpoenas for such documents, citing regulations adopted pursuant to the

Housekeeping Statute, 5 U.S.C. § 301,[10] this Court's opinion in U.S. ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), and other lower court opinions that have expanded Touhy. The Virginia trial court agreed, finding no power to order the CIA or the FBI to produce the documents—even for the court's *in camera* review. The trial court did not review the documents, nor petitioner's reasons for the requests. The Virginia Supreme Court summarily affirmed. Kasi, 508 S.E.2d at 60, Appendix at 4, 5.

A. This Court Did Not Create A New Federal Privilege In Touhy.

In Touhy, this Court ruled that a state court cannot hold a subordinate of a federal agency in contempt for refusing to comply with a state-issued subpoena because of his superior's instructions not to do so, when the federal agency's regulations enacted pursuant to the Housekeeping Statute require that he follow his superior's instructions. 340 U.S. at 466-467, 468. The Touhy Court expressly declined to determine whether the agency superior has the authority to refuse to produce the documents sought, whether the federal agency may properly refuse to produce such information when the information is sought in the context of a criminal prosecution, and whether the federal agency can refuse to produce such documents because of national secrets contained therein. Id. at 467, 468.

Despite the Court's narrow ruling in Touhy, lower courts have expanded that decision to stand for the principle that state

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[10] 28 C.F.R. §§ 16.21-16.29; 32 C.F.R. §§ 1905.1-1905.4.

courts can *never* enforce subpoenas against federal agencies. The lower courts began this expansion of Touhy by reference to the principle of sovereign immunity.[11] See U.S. v. Williams, 1999 U.S. App. LEXIS 3843 (4th Cir. 1999); Smith v. Cromer, 159 F.3d 875, 881 (4th Cir. 1998); Houston Business Journal, Inc. v. Office of the Comptroller of Currency, U.S. Dep't of Treasury, 86 F.3d 1208, 1211 (D.C. Cir. 1996); Edwards v. United States Dep't of Justice, 43 F.3d 312, 315 (7th Cir. 1994); State of Louisiana v. Sparks, 978 F.2d 226, 236 (5th Cir. 1992); Ferrell v. Yarberry, 848 F.Supp. 121, 123 (E.D. Ark. 1994).

However, instead of applying the Court's actual holding in Touhy and the doctrine of sovereign immunity, the lower courts created a mutation that acts as a federal privilege. E.g., Williams, 1999 U.S. App. LEXIS 3843 at *10; Smith, 159 F.3d at 879; Houston Business Journal, 86 F.3d at 1212 n. 4, 1213; Edwards, 43 F.3d at 314, 315, 316; Tholen Supply Co., Inc. v. Continental Cas. Co., 859 F.Supp. 467, 469 (D.Kan. 1994); State of Louisiana v. Parker, 661 So. 2d 603, 611 (La. App. 2 Cir. 1995), appeal denied, 667 So. 2d 1049 (La. 1996); see Sparks, 978 F.2d at 236 n. 18. This mutation actually ignores the long-standing rulings of this Court that the doctrine of sovereign immunity is inapplicable when

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[11] Sovereign immunity precludes state governments from interfering with the federal government's conduct of its business, Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989); see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949), and bars state court actions against the federal government. Maddox v. Williams, 855 F.Supp. 406, 414 (D.D.C. 1994), affirmed, 62 F.3d 408 (D.C.Cir. 1995); Smith v. Cromer, 159 F.3d 875, 879 (4th Cir. 1998).

the federal agent acts unconstitutionally, Dugan v. Rank, 372 U.S. 609, 621-622 (1962); Smith, 159 F.3d at 884 (Phillips, J., dissenting); see Larson, 337 U.S. at 690, and that the courts must determine whether any privilege can be legitimately asserted when there is a countervailing constitutional interest.[12] United States v. Nixon, 418 U.S. 683, 708, 709 (1974).

Lower courts applying the mutation to state criminal defendants' subpoenas for documents and testimony—like the Virginia trial court—accept the federal agencies' bare assertions of "privilege" and find that the agencies are immune from compulsory process. E.g., Williams, 1999 U.S. App. LEXIS 3843 at *8-9; Smith, 159 F.3d at 881; In re Gray, 1998 U.S. App. LEXIS 25779 (10th Cir. 1998).[13]

These courts fail to evaluate whether or acknowledge that the agencies' refusal to provide the information could or does

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[12] The mutation also ignores Congress' amendment of the Housekeeping Statute in 1958 to prevent this very occurrence. See Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979).

[13] See also McClure v. United States, 1995 WL 299849 (9th Cir. 1995); New York v. Kronberg, 672 N.Y.S.2d 63, 243 A.D.2d 132, 154 (N.Y. App. Div. 1998), appeal denied, 678 N.Y.S.2d 27 (N.Y. 1998); Ohio v. O'Neal, 1985 Ohio App. LEXIS 6819 (Ohio Ct. App. 1985); Nebraska v. Rice, 335 N.W.2d 269, 277 (Neb. 1983); In re Pratt, 170 Cal.Rptr. 80, 112 Cal.App.3d 795, 880 (Cal.Ct.App. 1980); Massachusetts v. Manning, 359 N.E.2d 51, 53-54 (Mass. App. Ct. 1977), reversed on other grounds, 367 N.E.2d 635 (1977); State of Louisiana v. Andrews, 250 So. 2d 359, 366 (La. 1971); Alexander v. Texas, 450 S.W.2d 70, 72 (Tex. Crim. App. 1970); see Sparks, 978 F.2d at 234-236.

violate the criminal defendants' Sixth and Fourteenth Amendment rights to exculpatory and mitigating evidence. Commonwealth of Pennsylvania v. Smith, 208 A.2d 219, 223, 225, 229 (Pa. 1965) (court reversed defendant's conviction because trial court violated defendant's rights to compulsory process and due process when it failed to compel FBI to produce information); New York v. Heller, 483 N.Y.S.2d 540, 126 Misc. 2d 575, 577, 578 (N.Y. Sup. Ct. 1984) (court denied federal government's motion to quash subpoena because granting the motion would deprive criminal defendant of his rights to compulsory process and due process); Buford v. Georgia, 282 S.E.2d 134, 137, 138 (Ga. Ct. App. 1981) (court reversed defendant's conviction because trial court deprived him of his right to compulsory process when it refused to compel the DEA to produce exculpatory information).

"It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 57 (1987)); Nixon, 418 U.S. at 711-712 ("allowance of the privilege...relevant in a criminal trial [] cut[s] deeply into the guarantee of due process of law and gravely impair[s] the basic function of the courts"); cf. Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (informer's privilege must give way if informant's identity is relevant to defense).

By failing to consider the criminal defendant's constitutional rights, the lower courts abdicate their responsibility to assess application of the doctrine of sovereign immunity and the legitimacy of the assertion of the "privilege." See Nixon, 418 U.S.

at 705; United States v. Reynolds, 345 U.S. 1, 9-10 (1953) ("Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers").

B. *In Camera* Review Would Protect Each Party's Interests.

At the very least, when faced with a defendant, like petitioner, in a state court criminal prosecution who is seeking exculpatory and mitigating information from a federal agency, the court should first review the information sought and held by the federal agency *in camera*. See Nixon, 418 U.S. at 711, 712, 713-714 (importance of privilege must be weighed against the detriment caused thereby to the guarantee of due process in the criminal justice system); Reynolds, 345 U.S. at 12; State of Florida v. Cohen, 887 F.2d 1451, 1455 (11th Cir. 1989) (remand to district court necessary for balancing of criminal defendant's interest in having potentially exculpatory evidence withheld by federal agency on claim of privilege with federal government's interest in protecting the flow of information in light of new facts); Ohio v. Lanci, 1980 Ohio App. LEXIS 12552 at *29-30 (Ohio Ct. App. 1980) (trial court properly reviewed FBI documents to determine whether criminal defendant's interest outweighed the government's interest); New York v. Santos, 368 N.Y.S.2d 130, 140 (N.Y. Sup. Ct. 1975); Elson v. Brown, 436 P.2d 12, 16-17 (Nev. 1967); see also Smith. 159 F.3d at 881; cf. Ritchie, 480 U.S. at 58 (criminal defendant was entitled to have trial court review file withheld by state on claim of privilege for exculpatory evidence); United States v. Bizzard, 674 F.2d 1382, 1386 (11th Cir.

1982) (trial court properly conducted *in camera* review of personnel file held by FBI when determining whether federal government was obligated to produce file to defendant pursuant to Brady v. Maryland, 373 U.S. 83 (1963)), cert. denied, 459 U.S. 973 (1982).

In camera review of the documents would allow for the protection of any government interest and ensure that any such interest is not unduly exercised at a sacrifice of "the fair administration of criminal justice." Nixon, 418 U.S. at 711-712; Smith, 159 F.3d at 885 (Phillips, J., dissenting) ("the right is not adequately protected by the court's simply accepting the government's proffer of non-materiality without conducting its own inspection").

Indeed, to hold otherwise would create an anomaly. Commonwealth of Pennsylvania v. Smith, 208 A.2d at 225. Were the criminal defendant being tried by the federal government in the federal court, he would be entitled to information held by federal agencies. See, e.g., Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774, 778, 780 (9th Cir. 1994) (neither Touhy nor the doctrine of sovereignty prevent a federal court from ordering a federal agency to comply with a subpoena); National Labor Relations Board v. Capitol Fish Co., 294 F.2d 868, 875 (5th Cir. 1961) (federal agency cannot assert blanket privilege—rather federal court determines whether federal agency can refuse to produce documents); Connaught Labs., Inc. v. SmithKline Beecham P.L.C., 7 F.Supp.2d 477, 479, 480 (D.Del. 1998) (federal

court can enforce subpoena against federal agency), appeal dismissed, 165 F.3d 1368 (Fed.Cir. 1999).

Likewise, if the investigation was conducted by the state prosecutor or state agencies rather than federal agents, the criminal defendant would be entitled to the information. See, e.g., Ritchie, 480 U.S. at 56, 57 (state prosecution must turn exculpatory and mitigating evidence over to criminal defendant); Commonwealth of Pennsylvania v. Smith, 208 A.2d at 225 (criminal defendant entitled to exculpatory information held by state).

C. This Case Is An Appropriate Vehicle For The Court To Clarify Its Decision In Touhy.

The Court has not addressed the "privilege" created by the lower courts' mutation of Touhy. However, in Smith v. Pennsylvania, 376 U.S. 354 (1964), this Court granted certiorari where the petitioner, a criminal defendant, claimed that the state trial court denied him the due process of law and deprived him of his right to compulsory process when it failed to compel the FBI to produce documents to him. The FBI was investigating the circumstances surrounding the crime for which the petitioner was arrested, so the petitioner subpoenaed the FBI. The trial court granted the FBI's motion to quash the subpoena and the Pennsylvania Supreme Court affirmed.

This Court, in response to the petition for a writ of certiorari, asked the Solicitor General for its position. The Solicitor General reported that the only objection to the subpoena was its breadth and indicated that there would be no objection to a narrower subpoena. This Court granted the petition and remanded

the case to the Pennsylvania Supreme Court for reconsideration in light of the Solicitor General's statement. 376 U.S. at 355. On remand, the Pennsylvania Supreme Court reversed the conviction because the trial court's failure to compel the FBI to produce the documents denied the petitioner his rights to compulsory process and due process. Commonwealth of Pennsylvania v. Smith, 208 A.2d at 229.

This Court has made it clear that the Virginia trial court's failure to review the information held by the FBI and CIA is reversible error if the information is material to petitioner's guilt or punishment. Ritchie, 480 U.S. at 58; see Kyles v. Whitley, 514 U.S. 419, 434 (1995) (the question is whether the inability to have the information "undermines confidence in the outcome of the trial").

Here, petitioner made a plausible showing of the existence, materiality and favorable quality of the documents held by the FBI and CIA. See Ritchie, 480 U.S. at 60 n.15. The FBI and CIA have documents regarding petitioner and petitioner's family because of their investigation of petitioner as a suspect in the killing of the CIA agents and also because of petitioner's family's previous history with the ISI and CIA.

These documents would have supported petitioner's motion to suppress evidence obtained as a result of his unreasonable seizure. The documents concerning the FBI's seizure of petitioner would expose its unreasonableness and the failure of the United States to comply with the mandatory extradition process set forth in the Extradition Act. The documents concerning the communications

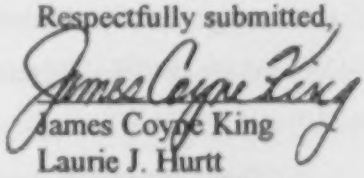
among the ISI, CIA and petitioner's family, the killing of petitioner's relative, and the CIA's involvement in the issuance of an amnesty and work permit to petitioner would have provided the jury a reasonable explanation for any reaction by petitioner to the CIA's interference with Islamic affairs and given petitioner another avenue for convincing the jury and the court to spare his life.

Independent of petitioner's interest, the broader and more important question is whether federal agencies can conduct investigations, arrest individuals and turn them over to the states for prosecution in order to avoid producing exculpatory and mitigating evidence that they would otherwise have to produce in federal prosecutions. The Court should exercise its jurisdiction pursuant to 28 U.S.C. § 1257(a) and review the extension of Touhy by the lower courts in state criminal cases which implicate defendants' Sixth and Fourteenth Amendment rights.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Court grant the Petition For A Writ of Certiorari.

Respectfully submitted,



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May 5, 1999

Supreme Court, U.S.
FILED

98 1812 MAY 6 - 1999

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MIR AIMAL KASI

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

On Petition for a Writ or Certiorari to the

Supreme Court of Virginia

APPENDIX - VOLUME I

APPENDICES A THROUGH W

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APPENDICES — TABLE OF CONTENTS

VOLUME I

APPENDIX A

The Opinion of the Virginia Supreme Court in Kasi v. Commonwealth of Virginia.....1

APPENDIX B

The Virginia Supreme Court's Denial of Petition for Rehearing..24

APPENDIX C

The Virginia Trial Court's Sentencing Order.....25

APPENDIX D

The Virginia Trial Court's oral findings on Entry of Judgment and Sentencing Order.....29

APPENDIX E

The Virginia Trial Court's Denial of Defendant's Motion to Set Aside Verdict and Order a New Trial.....36

APPENDIX F

The Virginia Trial Court's Denial of Motion to Reconsider Defendant's Motion To Set Aside Verdict and For a New Trial..38

APPENDIX G

The Virginia Trial Court's Denial of Defendant's Motion to Suppress evidence seized as a result of Defendant's seizure in violation of the Fourth Amendment.....39

APPENDIX H

The Virginia Trial Court's oral findings in connection with Defendant's Motion to Suppress.....41

APPENDIX I

Further oral findings of the Virginia Trial Court in Support of its Denial of Defendant's Motion to Suppress.....47

APPENDIX J

Further oral findings of the Virginia Trial Court in Support of its Denial of Defendant's Motion to Suppress.....50

APPENDIX K

The Virginia Trial Court's Denial of Defendant's Motion to Dismiss for lack of jurisdiction and Denial of Defendant's Motions to Suppress Evidence obtained as a result of the violations of the Extradition Treaty and Vienna Convention.....53

APPENDIX L

The Virginia Trial Court's oral findings in Support of its Ruling on Defendant's Motion regarding violation of the Extradition Treaty.....56

APPENDIX M

The Virginia Trial Court's oral findings in Connection with its Ruling on Defendant's Motions regarding the Vienna Convention.....58

APPENDIX N

The Virginia Trial Court's Orders on Defendant's Motions to enforce subpoenas served upon the FBI and CIA.....63

APPENDIX 0

The Virginia Trial Court's oral findings in connection with Defendant's Motions to enforce the subpoenas served upon FBI and CIA.....66

APPENDIX P

The Virginia Trial Court's Rule To Show with respect to the CIA.....68

APPENDIX Q

The Virginia Trial Court's Rule to Show Cause with respect to the FBI.....69

APPENDIX R

Extradition Treaty of 1931, 47 Stat. 2122 (1931).....71

APPENDIX S

Extradition Act, Act XXI of 1972 of the Republic of Pakistan, The Pakistan Code, Volume XVIII.....87

APPENDIX T

Vienna Convention on Consular Relations, 21 U.S.T. 77 (1963).....100

APPENDIX U

28 C.F.R. §§ 16.21-16.29.....103

APPENDIX V

32 C.F.R., §§ 1905.1-1905.4.....116

APPENDIX W

Testimony of FBI Agent Bradley J. Garrett.....122

APPENDIX A

Present: All the Justices

MIR AIMAL KASI

v. Record Nos. 980797
980798

OPINION BY JUSTICE
A. CHRISTIAN COMPTON
November 6, 1998

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
J. Howe Brown, Judge

On Monday, January 25, 1993, near 8:00 a.m., a number of automobiles were stopped in two north-bound, left-turn lanes on Route 123 in Fairfax County at the main entrance to the headquarters of the Central Intelligence Agency (CIA). The vehicle operators had stopped for a red traffic light and were waiting to turn into the entrance.

At the same time, a lone gunman emerged from another vehicle, which he had stopped behind the automobiles. The gunman, armed with an AK-47 assault rifle, proceeded to move among the automobiles firing the weapon into them. Within a few seconds, Frank Darling and Lansing Bennett were killed and Nicholas Starr, Calvin Morgan, and Stephen Williams were wounded by the gunshots. All the victims were CIA employees and were operators of separate automobiles. The gunman, later identified as defendant Mir Aimal Kasi, also known as Mir Aimal Kansi, fled the scene.

At this time, defendant, a native of Pakistan, was residing in an apartment in Reston with a friend, Zahed Mir. Defendant

was employed as a driver for a local courier service and was familiar with the area surrounding the CIA entrance.

The day after the shootings, defendant returned to Pakistan. Two days later, Mir reported to the police that defendant was a "missing person."

On February 8, 1993, the police searched Mir's apartment and discovered the weapon used in the shootings as well as other property of defendant. Defendant had purchased the weapon in Fairfax County three days prior to commission of the crimes.

On February 16, 1993, defendant was indicted for the following offenses arising from the events of January 25th: Capital murder of Darling as part of the same act that killed Bennett, Code ¶ 18.2-31(7); murder of Bennett, Code ¶ 18.2-32; malicious woundings of Starr, Morgan, and Williams, Code § 18.2-51; and five charges of using a firearm in commission of the foregoing felonies, Code ¶ 18.2-53.1.

Nearly four and one-half years later, on June 15, 1997, agents of the Federal Bureau of Investigation (BI) apprehended defendant in a hotel room in Pakistan. Defendant had been travelling in Afghanistan during the entire period, except for brief visits to Pakistan.

One June 17, 1997, defendant was flown from Pakistan to Fairfax County in the custody of FBI agents. During the flight, after signing a written rights waiver form, defendant gave an oral and written confession of the crimes to FBI agent Bradley J. Garrett.

Following 15 pretrial hearings, defendant was tried by a single jury during ten days in November 1997 upon his plea of not guilty to the indictments. The jury found defendant guilty of all

charges and, during the second phase of the bifurcated capital proceeding, fixed defendant's punishment at death based upon the vileness predicate of the capital murder sentencing statute, Code § 19.2-264.4.

On February 4, 1998, after three post-trial hearings, during one of which the trial court considered a probation officer's report, the court sentenced defendant to death for the capital murder. Also, the court sentenced defendant to the following punishment in accord with the jury's verdict: For the first-degree murder of Bennett, life imprisonment and a $100,000 fine; for each of the malicious woundings, 20 years' imprisonment and a $100,000 fine; and for the firearms charges, two years in prison for one charge and four years in prison for each of the remaining four charges.

The death sentence is before us for automatic review under former Code § 17-110.1(A) (now § 17.1-313(A)), see Rule 5:22, and we have consolidated this review with defendant's appeal of the capital murder conviction. Former Code § 17-110.1(F) (now § 17.1-313(F)). In addition, by order entered April 23, 1998, we certified from the Court of Appeals of Virginia to this Court the record in the noncapital convictions (Record No. 980798). That record consists only of three notices of appeal from the conviction order. No other effort has been made to perfect the noncapital appeals; therefore, those convictions will be affirmed and we shall not address them further.

In the capital murder appeal, we will consider, as required by statute, not only the trial errors enumerated by the defendant but also whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

whether the sentence is disproportionate to the penalty imposed in similar cases. Former Code § 17-110.1(C) (now § 17.1-313(C)).

At the outset, we will discuss the number, nature, and legitimacy of many issues raised by defendant. He assigned 92 errors allegedly committed by the trial court (placing 91 in his opening brief) and has not argued many of them (Nos. 8, 14, 15, 17, 18, 20, 21, 25, 26, 28, 32, 45, 47, 52, 61, 69, 72, 77, 78, 80, 89, 91 and 92); hence, they are waived and will not be considered. Jenkins v. Commonwealth, 244 Va. 445, 451, 423, S.E.2d 360, 364 (1992), Cert. denied, 507 U.S. 1036 (1993).

In addition, defendant has effectively presented no meaningful argument in support of many assignments that are actually briefed. We have considered these so-called arguments and find no merit in any of them. Weeks v. Commonwealth, 248 Va. 460, 465, 450 S.E.2d 379, 383 (1994), cert. denied, 516 U.S. 829 (1995). In this category are assignments 2, 5, 16, 19, 22, 23, 24, 29, 30, 33, 43, 51, 54, 73, and 87.

Also, other errors alleged (Nos. 6, 39, and 64) raise issues we previously have decided adversely to the argument defendant makes, and those decisions will not be revisited here. Typical of this group is assignment of error 39: "The Circuit Court erred in denying the defendant's motion to declare the Virginia death penalty statute unconstitutional."

Finally, from our study of this entire record, including the 4,903-page appendix, we have determined that many assignments of error that are argued in depth are devoid of any merit whatever. These are: Nos. 1, 3, 7, 9, 10, 27, 31, 34, 37, 38, 40, 41, 42, 44, 46, 48, 49, 62, 63, 65, 67, 68, 71, 74, 75, 76, 79, and 88. This group requires no extended analysis and mainly raises issues involving

the exercise of discretion by the trial judge on subjects such as continuances, pretrial publicity, discovery, and appointment or disqualification of counsel. Typical of this group is assignment of error 49: "The Circuit Court erred in denying defendant's motions for a continuance filed on August 11, 1997, and October 1, and October 8." We have considered this entire group of alleged errors and reject them without any further discussion.

The remaining 23 assignments of error raise issues, inter alia, regarding defendant's apprehension, his confession, suppression of evidence, jury selection, and juror conduct. There is no conflict in the evidence relating to any of the facts presented during the guilt phase of this trial; the defendant presented no evidence.

Near 4:00 a.m. on June 15, 1997, Agent Garrett and three other armed FBI agents, dressed in "native clothing," apprehended defendant in a hotel room in Pakistan. Defendant responded to a knock on the room's door and the agents rushed inside. Defendant, who has "a master's degree in English," immediately began screaming in a foreign language and refused to identify himself. After a few minutes, defendant was subdued, handcuffed, and gagged. Garrett identified him through the use of fingerprints. During the scuffle, defendant sustained "minor lacerations" to his arm and back.

When the agents left the hotel with defendant in custody, he was handcuffed and shackled, and a hood had been placed over his head. He was transported in a vehicle for about an hour to board an airplane. During the trip, Garrett told defendant he was an FBI agent.

The ensuing flight lasted "a little over an hour." After the plane landed, defendant was transferred to a vehicle and driven for about 40 minutes to a "holding facility" where he was turned over to Pakistani authorities. The FBI agents removed defendant's handcuffs, shackles, and hood when the group arrived at the holding facility, but the persons in charge of the facility put other handcuffs on him. Defendant was placed in one of the eight cells in the facility, where he remained until the morning of June 17.

During defendant's stay in the facility, the FBI agents never left his presence or allowed him to be interrogated or "harassed." He was allowed to eat, drink, and sleep. On two occasions, the agents removed defendant from his cell to "look at his back and look at his arm" and to take his blood pressure and pulse. The agents did not interrogate defendant in the holding facility and made certain he was treated "fairly and humanely."

On June 16, "late in the day," Garrett was advised by an official at the U.S. Embassy in Pakistan that defendant would be "released" the next morning. On June 17 near 7:00 a.m., defendant "was allowed to be released" from the facility in the custody of the FBI agents. He was handcuffed, shackled, and hooded during a 15-minute ride to an airplane. Once on the plane, the hood was removed. Shortly after boarding the aircraft, a physician checked defendant's "well being."

During the 12-hour flight to Fairfax County, Garrett first conducted a "background" conversation with defendant, discussing "his life in the United States, where he lived, where he worked." Garrett knew, from his four-and-one-half-year search for defendant, that he was a Pakistani national. Defendant was not a

U.S. citizen and he had not returned to the United States after he fled on January 26, 1993.

After the background conversation, Garrett advised defendant of rights according to Miranda v. Arizona, 384 U.S. 436 (1966). Defendant signed an FBI "Advice of Rights" form, after reading it and having it explained to him. He indicated he was waiving his rights and was willing to give a statement. The subsequent interview lasted about one and one-half hours before defendant signed a written statement summarizing the interview.

In the written statement, defendant confirmed he purchased the AK-47 rifle and about 150 rounds of ammunition several days before the incident in question. He said he drove his pickup truck to the scene, "got out of my vehicle & started shooting into vehicles stopped at a red light." Continuing, he stated that "I shot approximately 10 rounds shooting 5 people. I aimed for the chest area of the people I shot. I then returned to my truck & drove back to my apartment." He also stated that "several days before the shooting I decided to do the shooting at the CIA or the Israeli Embassy but decided to shoot at the CIA because if was easier because CIA officials are not armed."

As part of his oral statement to Garrett, defendant enumerated political reasons "why he wanted to do this shooting." He said he was "upset" because U.S. aircraft had attacked parts of Iraq, he was "upset with the CIA because of their involvement in Muslin countries," and he was concerned with "killing of Pakistanians by U.S. components." When Garrett asked defendant "why he stopped shooting," he replied "there wasn't anybody else left to shoot." When asked about the gender of those shot,

defendant replied "that he only shot males because it would be against his religion to shoot females."

On appeal, defendant mounts several constitutional and other attacks upon the trial court's refusal to suppress and the court's admission in evidence of defendant's statement to Garrett. First, defendant claims the statement was involuntary and was obtained through coercion. We do not agree.

The evidence on the issue, presented both a pretrial suppression hearing and during the guilt phase of the trial, was overwhelming and uncontradicted that defendant validly waived any constitutional rights he may have had in connection with the statement and that the statement was voluntary. No threats or promises were made to defendant, either when he was apprehended or aboard the aircraft, he was not offered anything in return for his statement. Defendant, who "had good command of the English language," told Garrett that he "understood his rights fully and completely." He never refused to answer any question, and at no time during the 12-hour return flight did he express any fear or indicate he was making a statement because he was afraid. There is no evidence of coercion while he was detained in Pakistan. Indeed, the FBI agents were careful to assure he was treated humanely. The trial court's detailed findings of fact that the waiver was knowing, voluntary, and intelligent and that the statement was voluntary are fully supported by the record. See Roach v. Commonwealth, 251 Va. 324, 340-41, 468 S.E.2d 98, 108, Cert. denied, 519 U.S. 951 (1996).

Next, defendant, attacking the jurisdiction of the trial court, contends that "either the Extradition Treaty between the United States and Pakistan or the Vienna Convention for Consular

Relations were violated" requiring "sanctions" to be imposed for these alleged violations. He argues the "abduction/seizure of Kasi was conducted outside and in express violation of the Extradition Treaty between the United States and Pakistan and without invoking the procedures set out by the laws of each country" and was contrary to law. He says the "sanction" for violation of the treaty should be reversal of the capital murder conviction and "repatriation to Pakistan without prejudice for a new trial."

Continuing, he argues the "record shows that at no time did the federal agents advise Kasi of his right to consult with a Pakistani diplomat pursuant to article 36(1) of the Vienna Convention on Consular Relations." He says "that suppression of all statements obtained by virtue of this illegal arrest and abduction in violation of the extradition treaty . . . and the violations of the Vienna Convention is the appropriate alternative sanction to enforce treaty rights violated." We reject the arguments based on the treaty and the "Vienna Convention."

During the pretrial hearing, the Commonwealth's Attorney stipulated that defendant was arrested in Pakistan by an FBI agent; that the agent did not "have any jurisdiction in the nation of Pakistan;" that defendant "was not taken before a judicial officer . . . until he returned to the United States and was presented before this Court"; that "in the course of time from his arrest until he was brought to this country there was no compliance with the Vienna Convention until my letter of July 3rd"; and that "the seizure in Pakistan was not made pursuant to any Pakistani paper or document which would allow him to be seized under the laws of Pakistan."" The record shows there "was an unlawful flight warrant issued by a U.S. Magistrate in Alexandria in February of

1993 authorizing Federal agents to arrest Mr. Kansi." Also, the record shows that the July 3 letter mentioned in the Stipulation was a letter from the prosecutor formally notifying the defense of defendant's right to seek consular assistance.

The defendant relies upon an Extradition Treaty between the United States and the United Kingdom. 47 Stat. 2122 (1931). Apparently, there is no extradition treaty directly between the United States and Pakistan. But the Attorney General is willing to assume, as represented by the defendant, that the "Islamic Republic of Pakistan has continued in force treaty promulgated between its former colonial sovereign, the United Kingdom, and the United States," and that it applies to this case.

The defendant focuses on Article 8 of the treaty, which provides:

> "The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed."

Contrary to defendant's contention, nothing in this treaty can be construed to affirmatively prohibit the forcible abduction of defendant in this case so as to divest the trial court of jurisdiction or to require that "sanctions" be imposed for an alleged violation of the treaty. The decision on this issue is controlled by United States v. Alvarez-Machain, 504 U.S. 655 (1992).

There, the respondent, a citizen and resident of Mexico, was forcibly kidnapped from his home and flown by private plane to Texas, where he was arrested for his participation in the

kidnapping and murder of a federal Drug Enforcement Administration (DEA) agent and his Mexican pilot. DEA agents were "responsible" for the abduction, although they were not personally involved in it. Id. at 657. The United States has an extradition treaty with Mexico. The issue in the case was "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." Id.

The Supreme Court, answering that query in the negative, said: "Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures." Id. at 664. The Court held that the treaty's language, "in the context of its history," failed to support the proposition that the treaty expressly prohibited abductions outside its terms. Id. at 666. The Court went on to hold that the treaty should not be interpreted to include an implied term prohibiting prosecution where a defendant's presence is obtained by means other than those established by the treaty. Id. at 666, 668-69. See Ker v. Illinois, 119 U.S. 436 (1886) (criminal defendant forcibly abducted from Peru to United States had no right to be returned to this country only in accordance with terms of extradition treaty between United States and Peru).

In the present case, as in Alvarez-Machain and Ker, defendant's seizure in a foreign country and his return to this country were not accomplished pursuant to an extradition treaty. The treaty language here does not expressly or impliedly prohibit prosecution in the United States where the defendant's presence was obtained by forcible abduction. Like the treaty in Alvarez-Machain, this treaty "does not purport to specify the only way in

which one country may gain custody of a national of the other country for the purposes of prosecution." Id. at 664. In sum, defendant was not "extradited" under the provisions of this treaty.

As a corollary to the treaty argument, defendant contends his seizure was "illegal and unreasonable" in violation of the Fourth Amendment to the U.S. Constitution and the equivalent Article I, ¶ 10 of the Constitution of Virginia. We do not agree.

In United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990), the Supreme Court held: "the available historical data show . . . that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory." The Court also said, "There is likewise no indication that the Fourth Amendment was understood . . . to apply to activities of the United States directed against aliens in foreign territory or in international waters." Id. at 267.

We now turn to defendant's reliance on Article 36(1) of the Vienna Convention on Consular Relations and Optional Protocol on Disputes (Vienna Convention), 21 U.S.T. 77, T.I.A.S. No. 6820 (Apr. 24, 1963), and his claim that its alleged violation requires suppression of his confession. Defendant conceded in the trial court there is no reported authority for the idea that a violation of the treaty creates any legally enforceable individual rights. And, the provisions of the document create no such rights. Indeed, the preamble states that the "purpose . . . is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." Article 36 merely deals

with notice to be furnished to the consular post of a national's state when the national is arrested or taken into custody in a foreign state.

In the present case, it makes no sense to say that, when the defendant was arrested in Pakistan and turned over to Pakistani authorities, the Vienna Convention required defendant to be notified of his right to contact Pakistani consular officers, even if that country maintained a "consulate" within its own borders. Indeed, the prosecutor, as soon as defendant returned to this country, notified the defense that defendant had the right to contact the Pakistani consulate here.

Finally on this issue, defendant's suggestion that if he had been advised of his so-called rights under the Vienna Convention, he would not have confessed to agent Garrett is just as speculative as the theory of "prejudice" that the Supreme Court recently rejected in Breard v. Greene, ___ U.S. ___, 118 S.Ct. 1352, 1355 (1998) (repudiating claim that if Vienna Convention had not been violated defendant would have accepted alleged plea agreement).

Next, defendant challenges the admissibility of an arguably inculpatory statement he made to a Fairfax County deputy sheriff and assets that such a claim is encompassed by assignments of error 4 and 83. Those assignments, however, challenge defendant's statements to federal authorities following his apprehension in Pakistan. None of defendant's assignments of error raises the issue argued; thus, it is procedurally defaulted. Rule 5:17(c).

Next, defendant contends the trial court erred when it refused to suppress the contents of a suitcase found during a search

of the apartment where defendant concealed the murder weapon. We disagree.

The record clearly establishes that Zahed Mir, defendant's roommate and the lessee of the apartment, consented to the search of a suitcase found in a hall closet within the apartment. Two handguns and magazines of AK-47 ammunition were found in the suitcase and eventually were received in evidence. The investigating police officer testified that he had received Mir's "verbal consent several times" to open the suitcase. The trial court correctly concluded, under the evidence, that Mir had the authority to give permission to the officer "to look in" the suitcase, rendering the search valid.

Next, defendant contends the trial court erred in denying his motion for a change of venue. Defendant asserts there were "inflammatory and inaccurate media reports" with "all three local newspapers" reporting that defendant had confessed to the crimes. Arguing that repeated inflammatory pretrial media reports mandate a change of venue, defendant says his constitutional right to a fair trial in this case was violated by refusal of his motion. We do not agree.

There is a presumption that a defendant will receive a fair trial in the jurisdiction where the crimes were committed. To overcome the presumption, a defendant must establish that the citizens of the jurisdiction harbor such prejudice against him "that it is reasonably certain he cannot receive a fair trial." Lilly v. Commonwealth, 255 Va. 558, 570, 499 S.E.2d 522, 531 (1998). The decision whether to grant a motion for a change of venue lies within the sound discretion of the trial court. Id.

In the present case, even though virtually all the prospective jurors indicated they had heard or read about the case, the court, after careful voir dire, seated a panel of 24 jurors, following detailed questioning of only 58 persons. Defendant did not overcome the presumption that he could receive a fair trial; there was no abuse of discretion by the trial court, especially in light of the relative ease with which the jury was selected. See Roach, 251 Va. at 342-43, 468 S.E.2d at 109.

Next, the defendant contends that the prosecutor, for discriminatory reasons, used a peremptory strike to remove juror 14, the "only juror of any color on the panel," according to defendant, in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and that the trial court erred in ruling to the contrary. We disagree.

Responding to the claim, the Commonwealth's Attorney represented to the trial court he had struck the juror "because she was the only member of the entire panel who never read anything about the case or heard anything about the case. My fear is somebody like that is kind of detached from the real world, and that's why I struck her." The trial court accepted this explanation, and properly denied defendant's claim.

Batson dictates that purposeful discrimination based upon race in selecting jurors violates the Equal Protection Clause. Once an accused makes a prima facie showing of such discrimination, a prosecutor must furnish a reasonable explanation in rebuttal, showing that the reason for the peremptory strike was race neutral. If the explanation is based upon factors other than the juror's race, it is deemed to be race neutral. Id. at 89. Accord Wright v. Commonwealth, 245 Va. 177, 186, 427 S.E.2d 379, 386 (1993), vacated on other grounds, 512 U.S. 1217 (1994).

Assuming, without deciding, that defendant established a prima facie case of purposeful discrimination under Batson, we hold that the record supports the trial court's conclusion that juror 14 was not struck from the panel because of her race. Striking a juror because she had not even read or heard anything about a well-publicized case clearly is a race-neutral reason. See Spencer v. Murray, 5 F.3d 758, 763-64 (4th Cir. 1993) (prosecutor entitled to strike potential juror if he found it "odd" that juror had heard nothing about highly publicized case), Cert. denied, 510 U.S. 1171 (1994).

Next, defendant argues that the evidence was insufficient to support his capital murder conviction. Defendant notes that to find him guilty of Darling's capital murder, the Commonwealth had to prove that Bennett's killing was murder in the first degree. Code § 18.2-31(7) ("willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction" constitutes capital murder). Defendant contends that his murder of Bennett can rise no higher than murder in the second degree because the Commonwealth failed to prove he intended to kill Bennett. We reject this contention.

As the Attorney General points out, the evidence is undisputed that defendant deliberately shot Bennett twice in the chest at extremely close range with a high-powered assault rifle. In his confession, defendant stated not only that he planned and carried out the attack with premeditation and without any provocation, but also that he deliberately aimed his weapon at the victims' chests. This evidence establishes as a matter of law that Bennett's murder was intentional.

Next, defendant contends the trial court erred in denying his motion to "preclude" the testimony of Frank Darling's wife in the penalty phase after she had testified during the guilt phase of the trial. Defendant argues, "In this instance," calling for the second time the murder victim's wife to give victim impact testimony violates "the due process standard of fundamental fairness." We do not agree.

Mrs. Darling was a front-seat passenger in the automobile driven by her husband at the time of his murder. She testified during the guilt phase about the events surrounding the shootings. During the penalty phase, she testified only about the substantial impact of her husband's murder upon her life. This is the type of victim impact testimony approved in Payne v. Tennessee, 501 U.S. 808, 827 (1991), and in Weeks, 248 Va. at 476, 450 S.E.2d at 389-90, and the trial court correctly refused to exclude it.

Next, defendant contends the trial court erred in failing to sustain his "motion to strike the evidence as to vileness and future dangerousness," both of which issues were submitted to the jury in proper instructions. The defendant apparently does not argue the evidence was insufficient to establish that Darling's murder was vile, in that it involved "depravity of mind or aggravated battery to the victim," Code § 19.2-264.4(C). He admitted during oral argument there was "sufficient evidence to reach the jury on the question of vileness." Instead, he argues: "The trial court's failure to strike the evidence as to future dangerousness was a structural error that unfairly prejudiced Kasi in the sentencing phase" because the prosecutor's argument in support of the future dangerousness predicate (that defendant "would constitute a continuing serious threat to society," id.) "may well have made it

easier to show 'depravity of mind.'" There is no merit to this contention.

There was sufficient evidence to submit to the jury the issue of future dangerousness. Such a finding may be based upon "the circumstances surrounding the commission of the offense" of which defendant was accused. Id. And, a jury may properly conclude, which this jury chose not to do, that the circumstances of this heinous crime satisfy the future dangerousness predicate in that defendant would "constitute a continuing serious threat to society." Id. Hence, because the issue of future dangerousness properly was submitted to the jury, it becomes irrelevant whether the prosecutor's argument on that issue "may well have made it easier" to show vileness.

Next, defendant contends the trial court erred in denying his motion for a new trial because the prosecutor allegedly failed to disclose that Mrs. Darling had been diagnosed as having a post-traumatic stress disorder. The presentence report revealed that, as the result of defendant's murder of her husband in her presence, she suffered from the disorder. In the motion, defendant asserted the information concerning the disorder, affecting one of the Commonwealth's principal witnesses, was "exculpatory," and that the prosecutor's failure to disclose it at trial violated Brady v. Maryland, 373 U.S. 83 (1963). The trial court correctly denied the motion during a post-trial hearing.

The Commonwealth's Attorney unequivocally represented to the court that neither he nor any of the investigating police officers had knowledge at the time of trial "of the label that had been placed on this witness by a doctor in Pennsylvania." The court accepted the representation and found that no one connected

with the prosecution "knew of this event and there's no evidence that they did." Hence, there is no merit in defendant's Brady claim. The prosecution's duty to disclose is limited to information then known to it. See Robinson v. Commonwealth, 231 Va. 142, 155, 341 S.E.2d 159, 167 (1986).

Next, defendant contends the trial court erred in certain rulings on jury matters made during and after the trial. We already have ruled that several jury related issues defendant raises are meritless, that is, the court's refusal to inquire of the jurors whether they engaged in premature deliberations (assignment of error 31) and refusal to declare a mistrial when the jury expressed concern about their personal security (assignment of error 34).

During the morning of the second day of trial in the penalty phase, and after the verdict in the guilt phase had been announced, defendant advised the court there had been press reports that morning of the killing of four Americans in Karachi, Pakistan the preceding evening. Defendant then asked the court to question the jurors individually to determine whether any had heard or read the reports. The court declined the motion, but continued its practice of asking the jurors at the beginning of each day of trial whether they had followed the court's admonition not to read, look at, or listen to any reports about the case. Juror 31 accidentally heard a portion of a radio report about the Karachi killings, but the court, upon questioning her, determined she remained impartial and that none of the other jurors were aware of the report.

The case proceeded for the remainder of the morning with testimony of defendant's mitigation witnesses. After lunch, however, the trial court decided to sequester the jury for the rest of

the case. The court said the press reports of the trial had degenerated into "opinion and speculation," noting that "the reporting has gotten crazy."

The court's refusal to grant defendant's repeated motions for a mistrial during this series of trial events was an exercise of the court's sound discretion, and we find no abuse of that discretion.

Next, defendant contends the trial court erroneously denied permission for defendant to contact a juror for questioning and to conduct an inquiry about the jury's deliberations. The issue arose against the following background.

Prior to trial, the court denied permission for defendant to contact potential jurors. The names of the jurors were not made public by agreement of counsel. At the beginning of the penalty stage on November 11, the court entered an order prohibiting the disclosure of "the name, address, identity or image" of any juror after considering "the need to protect jurors, the absolute right of jurors not to discuss the case, and protection of the confidentiality of juror deliberations."

On November 20, six days after the jury's sentencing verdict was rendered, a newspaper published an article reporting information gleaned from an interview with one juror about the penalty stage deliberations. The article quoted the juror as stating, for example, that some jurors "thought the crime was vile because Kasi, an immigrant, 'had attached the American way of life.'" Also, the juror reportedly labeled defendant a "terrorist," a term the court had prohibited the participants from attaching to defendant during the trial proceedings.

On January 6, 1998, defendant moved to set aside the sentencing verdict, alleging juror misconduct on the basis of the article. He also asked for permission to subpoena the juror for interrogation. After a hearing, the trial court, assuming the news article accurately reported the juror's statements, denied both motions. The court ruled that the reported information "relates to the mental impressions of the jury and the way that they deliberated and considered the evidence." Hence, according to the court, inquiry of the jury was not allowed. The trial court was correct.

Virginia has been more careful than most states to protect the inviolability and secrecy of jury deliberations, adhering to the general rule that the testimony of jurors should not be received to impeach their verdict, especially on the ground of their own misconduct. Jenkins, 244 Va. at 460, 423 S.E.2d at 370. Generally, we have limited findings of prejudicial juror misconduct to activities of jurors that occur outside the jury room. Id. Here, the alleged misconduct clearly occurred within the confines of the jury room, and a post-trial investigation into the allegations was unwarranted.

Finally, defendant contends the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor, and that the death sentence was excessive or disproportionate to the penalty imposed in similar cases. While not directly addressing those issues, defendant asks the Court to "commute this death sentence to life in prison without parole."

The defendant bases his plea for commutation on an argument laced with hyperbole, and threats inappropriate in an appellate brief. He reaches conclusions having absolutely no

foundation in this record. For example, he says the death sentence resulted from the "open hostility" of the trial judge and because the prosecutors "were diligent in maligning the defense team repeatedly in the media." The record shows otherwise. The trial court in all the proceedings was thorough, even-handed, and considerate of all counsel, and presided in a manner that was fair both to the Commonwealth and the defendant. The Commonwealth's Attorney was diligent, well-prepared, and did not exceed the bounds of conduct expected of an aggressive prosecutor.

The defendant says that because his crimes were "political," he somehow is entitled to First Amendment protection, and that his death sentence should be commuted to avoid possible violent acts of reprisal. As the Attorney General observes, defendant received the death sentence, not because he had a political motive, but because he murdered two innocent men, and maimed three others, in an extremely brutal and premeditated manner. As the defendant moved among the stopped automobiles, he shot through the rear window of the Darling vehicle, severely wounding Darling in the torso. In a few seconds, defendant appeared at the front of the Darling vehicle and fired at him again, destroying a part of his head. Darling also suffered at least one gunshot wound to his lower leg, resulting in a compound fracture. There is nothing "arbitrary" about a death sentence imposed under the circumstances of this case and, thus, there is no basis for commutation.

In conducting our proportionality review, we must determine "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar

crimes, considering both the crime and the defendant." Jenkins, 244 Va. at 461, 423 S.E.2d at 371. See former Code § 17-110.1(C)(2) (now § 17.1-313(C)(2)). We have examined our records of all capital murder cases, see former Code § 17-110.1(E) (now § 17.1-313(E)), including those cases where a life sentence was imposed. We have particularly studied those cases in which the death penalty was based on the vileness factor. See Cardwell v. Commonwealth, 248 Va. 501, 517, 450 S.E.2d 146, 156 (1994), cert. denied, 514 U.S. 1097 (1995).

Based upon this review, we conclude that defendant's death sentence is not excessive or disproportionate to penalties generally imposed by sentencing bodies in the Commonwealth for similar conduct. The death sentence generally is imposed for a capital murder when, as here, the defendant is also convicted of killing another person. Goins v. Commonwealth, 251 Va. 442, 469, 470 S.E.2d 114, 132 cert. denied, 519 U.S. 887 (1996).

Consequently, we hold the trial court committed no reversible error, and we have independently determined from a review of the entire record that the sentence of death was properly assessed. Thus, we will affirm the trial court's judgment.

Record No. 980797 – Affirmed.

Record No. 980789 – Affirmed.

APPENDIX B

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 8th *day of* January, 1999.

Mir Aimal Kasi, Appellant,

Against Record Nos. 980797 and 980798

Circuit Court No. 79148

Commonwealth of Virginia Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 6th day of November, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A copy

Teste:

Clerk

APPENDIX C

SENTENCING ORDER

JURY TRIAL

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FEDERAL INFORMATION PROCESSING

STANDARDS CODE: **059**

Hearing Date: **January 23, 1998**

Judge: **J. HOWE BROWN**

COMMONWEALTH OF VIRGINIA

Versus

MIR AIMAL KASI, Defendant

This case came before the Court for sentencing of the Defendant, who appeared in person with his Counsel Richard Goemann, Frank Roman, Crystal Meleen and Judith Barger. The Commonwealth was represented by Robert Horan. The Defendant appeared while in custody.

On November 10, 1997, the Defendant was found guilty of the following offenses:

CASE NUMBER	OFFENCE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
79148	CAPITAL MURDER Count I (F)	1/25/93	18.2-31(7)
79148	FIRST DEGREE MURDER – Count II (F)q	1/25/93	18.2-32
79148	MALICIOUS SHOOTING Count III (F)	1/25/93	18.2-51
79148	MALICIOUS SHOOTING Count IV (F)	1/25/93	18.2-51
79148	MALICIOUS SHOOTING Count V (F)	1/25/93	18.2-51

79148	USING A FIREARM IN THE COMMISSION OF A FIREARM IN THE COMMISSIONOF A FELONY – Count VI (F)	1/25/93	18.2-53.1
79148	USING A FIREARM IN THE COMMISIONOF A FIREARM IN THE COMMISSIONOF A FELONY – Count VII	1/25/93	18.2-53.1
79148	USING A FIREARM IN THE COMMISSION OF A FIREARM IN THE COMMISSION OF A FELONY – Count VII (F)	1/25/93	18.2-53.1
79148	USING A FIREARM IN THE COMMISSIONOF A FIREARM IN THE COMMISSION OF A FELONY – Count IX (F)	1/25/93	18.2-53.1
79148	USING A FIREARM IN THE COMMISSION OF A FIREARM IN THE COMMISSION OF A FELONY – Count X (F)	1/25/93	18.1-53.1

The presentence report was considered is ordered filed as a part of the record in this case in accordance with the provisions of Code § 19.2-2-299.

Before pronouncing the sentence, the Court inquired if the Defendant desired to make a statement and if the Defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

On Count I – CAPITAL MURDER – The Court **ORDERED** that the Defendant be sentenced to death. The Court further **ORDERED** that September 15, 1998 be set as the date of execution.

Incarceration with the Virginia Department of Corrections for the terms of:

- FIRST DEGREE MURDER – Count II – Life and a fine of $100,000.
- MALICIOUS SHOOTING – Count II – Life and a fine of $100,000.

- MALICIOUS SHOOTING – Count IV – Twenty years imprisonment and a fine of $100,000.
- MALICIOUS SHOOTING – Count V – Twenty years imprisonment and a fine of $100,000.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY - Count VI – two (2) years in prison.
- USING A FIREARM INTHE COMMISSION OF A FIREARM IN THE COMMISSION OF A FELONY – Count VII – four (4) years in prison.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY – Count VIII –four (4) years in prison.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY – Count IX – four (4) years in prison.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY – Count X – four (4) years in prison.

The total sentence imposed is **Death, Life in Prison and seventy-eight (78) years.**

FINE. The Court imposed a fine in the amount of $400,000 in this case.

COSTS. The Defendant shall pay all costs of this case.

APPEAL RIGHTS. The Court advised the Defendant of his right to appeal from the sentence imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay. It is **ORDERED** by the Court that in the event the Defendant or his Counsel files a notice of appeal, the transcript is to be prepared and is made a part of the record in this case.

The Court further **ORDERED** that the Office of the Public Defender be appointed to represent the Defendant in his appeal **PUBLIC DEFENDER FEE.** Richard Goemann, Office of the Public Defender, who was appointed to represent the Defendant in this case is allowed a fee of 265.00. This fee is to be assessed as costs as provided in Section 19.2-163.2(7) of the 1950 Code of Virginia, as amended.

The Defendant was remanded to the custody of the Sheriff.
ENTERED this 4th day of February, 1998

/ss_____
JUDGE J. HOWE BROWN

DEFENDANT IDENTIFICATION:
Alias: MIR AIMAL KANSI
SSN: 225-65-2625
DOB: 2-10-64
Sex: Male

SENTENCING SUMMARY:
TOTAL SENTECE IMPOSED:
- CAPITAL MURDER – Count I - Death
- FIRST DEGREE MURDER – Count II – Life and a fine of $100,000.
- MALICIOUS SHOOTING – Count III – Twenty years imprisonment and a fine of $100,000.
- MALICIOUS SHOOTING – Count IV – Twenty years imprisonment and a fine of $100,000.
- MALICIOUS SHOOTING – Count V – Twenty years imprisonment and a fine of $100,000.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY – Count VI – two (2) years in prison.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY – Count VII – four (4) years in prison.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY – Count VIII – four (4) years in prison.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY – Count IX – four (4) years in prison.
- USING A FIREARM INTHE COMMISSIION OF A FIREARM IN THE COMMISSION OF A FELONY – Count X – four (4) years in prison.

TOTAL SENTECE SUSPENDED: -0-

1 **APPENDIX D**

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----------x

COMMONWEALTH OF VIRGINIA :

-vs- : CRIMINAL DOCKET

MIR AIMAL KASI, : NO. 79148

Defendant. :

----------x

Circuit Courtroom 5E

Fairfax County Courthouse

Fairfax, Virginia

Friday, January 23, 1998

The above-entitled matter came on to be heard, without a Jury, before the HONORABLE J. HOWE BROWN, JR., Judge, in and for the Circuit Court of Fairfax County, in the Courthouse, Fairfax, Virginia, beginning at 2:01 o'clock p.m.

APPEARANCES:

On behalf of the Commonwealth:

Robert F. Horan, Jr., Esq.

Commonwealth Attorney

On behalf of the Defendant:

Judith Barger, Esq.

Richard Goemann, Esq.

Crystal Meleen, Esq.

Frank Romano, Esq.

because it was -- it is the result of the wrong policy of the American government towards Muslims.

THE COURT: I don't find that to be a reason to delay sentencing. If you'll have a seat for a moment, please.

(The Defendants sits.)

THE COURT: With regard to the non-capital cases, the Court has reviewed the presentence report, considered the evidence, and I find no reason to alter the jury verdict. Therefore, in count two, the murder of Lansing Bennett, I sentence the Defendant to life plus $100,000 fine. In count three, the malicious shooting of Nicholas Starr, I sentence the Defendant to 20 years in the penitentiary and a $100,000 fine. In count four, the malicious shooting of Calvin Morgan, I sentence the Defendant to 20 years in the penitentiary and a $100,000 fine. In count five, the malicious shooting of Steven E. Williams, I sentence the Defendant to 20 years in prison plus a $100,000 fine. In count six, the use of a firearm in the murder of Frank Darling, I sentence the Defendant to two years in the penitentiary. In count seven, the use of a firearm in the murder of Lansing Bennett, I sentence the Defendant to four years in the penitentiary. In count

eight, the use of the a firearm in the maiming of Nicholas Starr, I sentence the Defendant to four years in the penitentiary. In count nine, the use of a firearm in the maiming of Calvin Morgan, I sentence the Defendant to four years in the penitentiary. In count ten, the use of a firearm in the maiming of Steven Williams, I sentence the Defendant to four years in the penitentiary.

Let me say personally and professionally whatever you may think of me, I have great respect for defense counsel. Ms. Meleen writes as good a brief as anyone can write. Mr. Romano and Mr. Goemann give as good a talk, question witnesses well, play off against each other, and represented Mr. Kasi well. Ms. Barger left all she had on the courtroom floor in an effort to save him from death before the jury. You provided him with a good and satisfactory and fine defense, and you have reason to -- no reason to be ashamed or worried about anything that you did.

When I was being questioned by the legislature in 1983 for this job, some member of the legislature, I don't remember who now, asked me a question that I thought then was a very strange question and still do. I wondered at the time if it was a trick question. And the question

was "Would you have any problem sentencing someone to death?" And my answer then and my answer now is yes. It's an awesome responsibility and I don't do it lightly, but in an appropriate case I will follow the law.

The jury found the act of killing Frank Darling to be vile. That finding is fully supported by the evidence. Mr. Kasi planned to shoot innocent people in circumstances where he thought it was the best chance of their being unarmed and unprotected. He chose a weapon specifically because of its accuracy. The evidence supports the theory that he shot Frank Darling and then returned to blow part of his head off while his wife sat beside him in the car. This act is the very essence of vile. The jury was fully justified in rejecting the evidence offered in mitigation. The experts differed on whether any lesions or damage that Mr. Kasi's brain has had any effect on his personality and altered his personality in any way that would mitigate his acts here.

If you follow the defense expert you come to one conclusion. If you follow the Commonwealth's expert you come to another conclusion. So as with many cases, we are left to the facts in the case and our analysis of it, and the facts do not support the theory that he had an

altered personality that should mitigate against the death penalty. He planned this killing several days in advance. This was not a sudden thing that he did. He gave and gives religious and political reasons for his acts. He came to the CIA prepared. He chose his victims carefully, avoiding women because he thought his religion required him to do so. He escaped and avoided capture for a number of years. His acts were the product of a depraved mind but not a brain-damaged mind.

It's true that he comes for a good family who love and support him. Some of the most poignant moments in this trial came when his former grammar school teachers testified, especially one who cried on the stand when shown his pictures as a young man and said "innocent boy." That innocent boy he may have been, but he grew into a cold blooded killer.

The jury gave the appropriate and just sentence in the murder of Frank Darling, and I find no reason to alter that sentence. I sentence the Defendant to death. I set the execution date September 15, 1998. Mr. Kasi has a right to appeal any error of the Court during this trial. And of course, the death sentence must be appealed, and I appoint Mr. Goemann of the Public

Defender's at this time to represent him on that appeal. He is remanded to the custody of the Sheriff to serve his sentence.

(The defendant exists.)

THE COURT: The court will stand in recess.

- -

(Whereupon, at 2:42 o'clock p.m. the hearing in the above-entitled matter was concluded.)

CERTIFICATE OF COURT REPORTER

I, STACEY B. GRIFFIN, a certified verbatim reporter, do hereby certify that the foregoing proceedings were taken by stenomask means which were thereafter reduced to typewriting by me; that the foregoing is a true record of the testimony given by said witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

STACEY B. GRIFFIN, CVR
Court Reporter

APPENDIX E

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	**) CRIMINAL**
VERSUS	**) NUMBER 79148**
MIR AIMAL KASI	**) INDICTMENT -**
A/K/A MIR AIMALKANSI	**) CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Court II), MAIMING (Count III, IV, V) and USING A FIREARM IN THE COMMISSION IN THE COMMISSION OF A FELONY (Count VI, VII, VIII, IX, X)**

On February 4, 1998, The Commonwealth's Attorney, the Defendant, MIR AIMAL KANSI, A/K/A- MIR AIMAL KANSI, Richard Goemann, Crystal Meleen, and Frank Romano, Counsel for the Defendant, appeared before this court. The Defendant stands convicted of the felonies of CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Count II), MAIMING (Count II, IV, V) and USING A FIREARM IN THE COMISSION OF A FIREARM IN THE COMMISSION OF A FELONY (Count VI, VII, VIII, IX, X) and he appeared while in custody.

This case came before this Court today on motions filed by counsel for the Defendant.

The Court denied, after hearing argument of Counsel, the Defendant's Motion for Return of Identifying Information Concerning Jurors and For Leave of court to Interview Jurors. The Court further **ORDERED** that the Office of the Public Defender not initiate any contact with any Juror.

The Court, without argument from the Commonwealth's Attorney, denied Counsel for the Defendant's Motion to Set Aside and Order a New Trial.

Counsel for the Defendant's Motion to continue was denied after hearing argument of Counsel.

The Court, after hearing evidence on behalf of the Defendant and argument of counsel, denied Counsel for the Defendant's Motion to Set Aside Verdict and For A New Trial.

Counsel for the Defendant's Motion to Continue was denied after argument of Counsel.

The Court, after hearing evidence on behalf of the Defendant and argument of Counsel, denied Counsel for the Defendant's Motion to set Aside Verdict and For A New Trial. Counsel for the Defendant moved the Court to accept the previous testimony of Judy Becker-Darling as evidence of this motion. The Court granted the motion without argument.

The Defendant was remanded to the custody of the Sheriff

Entered on February 17, 1998.

s/_____

JUDGE J. HOWE BROWN

cc: Robert Horan, Commonwealth Attorney

Richard Goemann, Counsel for the Defendant

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	**) CRIMINAL**
VERSUS	**) NUMBER 79148**
MIR AIMAL KASI	**) INDICTMENT -**
A/K/A MIR AIMAL KANSI	**) CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Court II), MAIMING (Count III, IV, V) and USING A FIREARM IN THE COMMISSION IN THE COMMISSION OF A FELONY (Count VI, VII, VIII, IX, X)**

On February 19, 1998, the Defendant, by Counsel, filed a Motion to Reconsider Defendant's Motion To Set Aside Verdict And For a New Trial. The Court, after a full consideration of the matter, denied the motion, without oral hearing, as the matters raised in the motion were fully considered at the hearing on the original motions.

Entered on February 24, 1998.

s/_____

JUDGE J. HOWE BROWN

cc: Commonwealth Attorney

Richard Goemann, Counsel for the Defendant

APPENDIX G

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	**CRIMINAL NUMBER 79148**
VERSUSS	)	
MIR AIMAL KASI A/K/A MIR AIMAL KANSI	)	**INDICTMENT CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Count II), MAIMING (Count III, IV, V) and USING A FIREARM IN THE COMMISSION IN THE COMMISSION OF A FELONY (Count VI, VII, VIII, IX, X)**

On October 27, 1997, the Commonwealth's Attorney, the Defendant, MIR AIMAL KANSI, and Richard Goemann, Crystal Meleen, Frank Romano, Judith Barger, Counsel for the Defendant, appeared before this court. The Defendant is indicted with the felonies of CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Count II), MAIMING (Count III, IV, V) and USING A FIREARM IN THE COMMISSION OF A FIREARM IN THE COMMISSION OF A FELONY (Count VI, VII, VIII, IX, X) and he appeared while in custody.

This case came before this Court today for hearings on motions filed by Counsel for the Defendant.

The Court, after hearing argument of counsel, denied the Defendant's Motion to Dismiss Indictment for Lack of Jurisdiction.

The Court denied the Defendant's Motion for Daily Transcript, after hearing argument of Counsel.

The Commonwealth's Attorney stipulated that the information contained in the search warrant is a true and accurate statement of the facts that was necessary to obtain the search warrant.

Counsel for the Defense withdrew the Motion to Suppress as it pertains to the search of the apartment.

The Court, after presentation of evidence and hearing argument of Counsel, denied the Defendant's Motion to Suppress the evidence seized in the suitcases.

After presentation of evidence and hearing argument of counsel, the Court denied the Defendant's Motion to Suppress Evidence seized as a result of his seizure in violation of the fourth amendment.

The Court denied the Defendant's Motion to Suppress Statements Made to Sheriff's Deputy Obtained in Violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 to the Virginia Constitution, after hearing argument of Counsel.

The Court, after presentation of evidence and hearing argument of Counsel, denied the Defendant's Motion to Change Venue.

The Defendant was remanded to the custody of the Sheriff.

Entered on November 5, 1997.

S/_____
JUDGE J. HOWE BROWN

cc: Robert Horan, Commonwealth Attorney
Richard Goemann, Counsel for the Defendant

APPENDIX H

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----------x

COMMONWEALTH OF VIRGINIA, :

vs. : CRIMINAL NO.79148

MIR AIMAL KASI :

a/k/a MIR AIMAL KANSI, :

Defendant. :

----------x

Courtroom No. 4H

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

which basically means that a citizen of the United States who goes abroad and is arrested by the United States law enforcement officers and brought back to the United States can not claim a 4th Amendment violation.

The whole discussion of Verdugo is what does the people mean. And the people means citizens or people who have this substantial connection with the United States. That's their whole focus in Verdugo. What does this word, this phrase mean.

And surely if a person, a citizen of the United States leaves this country, they have not forfeited their peoplehood, they have not forfeited the protections of being part of the people of the United States. So the status of the person is crucial.

And again, Your Honor, I submit that it is the Commonwealth that has the burden to prove that status when they are asking that someone that they seized not receive the protections of the Constitution.

THE COURT: I find two things. First, I find that the status of the person is the issue in Verdugo, or however you say that word. And I find further the burden is on the Defendant to show that.

The issue that we need to address is was this

Defendant one of the people. He is asking that protection of the 4th Amendment be applied to him. He has to make a prima facia case to show that he is entitled to claim that protection and at least a prima facia case that it was violated.

Now I think once he makes that prima facia case then I, in disagreement with Mr. Horan, I guess, think the burden is on the Commonwealth to prove the facts with regard to that event.

But to bring himself within -- the Commonwealth isn't asking that anything that he be deprived of any right. He's asking that certain things be done because he's entitled to the right. And he has to show a prima facia case that he's entitled to it. In most cases, there isn't any question. Nobody, you know, everybody -- it's one of those everybody knows things.

But here, the only thing I know from the -- anything in the case about Mr. Kansi's connection with the United States is that on one day he is accused of being here. I know knowing else about it, and I think the burden is on you to show it.

If you want to rely on that and just say, you know, stop there, I guess you can and you can appeal on

that point and we'll see. If you want to go forward and present evidence that he is one of the people, I'll hear the evidence. But if you're going to rely on where you are, then I say you have not made a burden that requires the Commonwealth to go forward and he's not entitled to the protection of the 4th Amendment because you haven't made the case that he is.

So I guess you've got a choice. You can either rest there and live to fight another day or you can present the evidence and live to fight another day.

MR. GOEMANN: As much as I'd like to rest, Your Honor, right now, I will not. Let me note my exception to the Court's ruling.

THE COURT: You may certainly note your exception.

MR. GOEMANN: And I would ask, then, for a brief continuance to subpoena a witness that I believe will be able to meet the Court's burden that is placed on the Defendant.

THE COURT: Okay. What does that do to any evidence that you may have brought to -- do you have any objection, I guess? How about the 22nd. We've got the 22nd. Is that enough time?

MR. GOEMANN: If I can -- if I can get a subpoena issued today, Your Honor, I might be able to get it served tomorrow for the 22nd.

THE COURT: What's your position?

MR. HORAN: Well, Judge, the problem is that we've come in here prepared to respond to the allegations. They have made no claim either a, that he's an American citizen or that he occupies some peculiar status which makes the 4th Amendment apply to --

THE COURT: Well, they didn't do that because they erroneously thought that was your burden. I now have said it's not your burden. It's theirs.

I guess if you want to present your evidence and have me wait and see, you can do that, if you want to. If you have a problem getting your witnesses back here on the 22nd.

It's your burden to show the facts of the event if, in fact, he comes within the purview of the -- of the 4th Amendment which I don't know at this point.

MR. HORAN: They will have to get someone to perjure himself or herself to prove that he's an American citizen because he's not.

THE COURT: Well, I think -- well, I won't say

that. The issue is not is he an American citizen, the issue is he one of the people in the 4th Amendment.

So are we going to continue to the 22nd? Do you need another date?

MR. GOEMANN: Your Honor, well, the 27th. We have that date. I don't want to take any chances of having to come up and bring the witnesses again --

THE COURT: Yeah, I guess, okay.

MR. GOEMANN: -- and us being unable to subpoena a witness.

THE COURT: I guess we can do it on the 27th. We'll be busy little beavers on the 27th, I guess.

What are we continuing to the 27th? Again, I know that these motions overlap to some extent and I'm trying to keep straight what motion I'm hearing.

I have in my hand, here, the motion to suppress evidence that begin in the way that I said that sometime the beginning of June the Defendant, Mir Aimal Kansi, was abducted from Pakistan. Is that the motion we're continuing to the 27th?

MR. GOEMANN: Yes, Your Honor.

THE COURT: Are there any others yet? Or is

23 that it as far as --

APPENDIX I

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----------x

COMMONWEALTH OF VIRGINIA, :

vs. : CRIMINAL NO.79148

MIR AIMAL KASI :

a/k/a MIR AIMAL KANSI, :

Defendant. :

----------x

Courtroom No. 4H

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

that -- to try to reduce this to sort of an absurd scenario, I think really misses the point.

If someone has been here for several years then the fourth amendment does apply to them and Reed versus Covert, clearly says that, the fourth amendment is not bound by the borders of the United States. If it applies to you here, then when you go across to another country, the fourth amendment applies to you. And that's what Reed was all about.

So there's no -- it doesn't -- the protections that you have here don't stop at the border and I don't think any of this case law can be read to indicate that. And I would ask that the Court find that we did meet our burden here. I'll stop at that.

THE COURT: I find that the fourth amendment does not apply to Mr. Kasi's, we'll call it arrest. I don't know whether I'm using the right word or not but let's call it that, in Pakistan, but we're in a foreign country by the FBI. The Defendant's evidence shows that he is not one of the people to whom the fourth amendment applies.

He was last in this country four and a half years before the event that I'm calling the arrest. He's

not a U.S. citizen. There's no evidence he had any contact with the United States in the intervening period of time and the arrest occurred in a foreign country. And under those facts, he is not entitled to the protection.

Now, on the -- it's always possible that I'm wrong about that and if you want to present evidence or argue the point that -- I mean the evidence was presented, I take it, at least in part by Agent Garrett last week. If you want to argue the point of whether the fourth amendment, if it applied, was violated or not, you may in order to give the Appellate Court the chance to say, well, you're wrong about that but it does or doesn't apply.

MR. HORAN: Well, Your Honor, it is very hard from reading the United States Supreme Court cases to find out just what sort of connection they're talking about.

THE COURT: No; I'm not talking about connection. I'm talking about assuming that I'm -- I said it didn't apply. Assuming I'm wrong about that, then some Court needs to decide whether the fourth amendment was, in fact, violated or not.

MR. HORAN: Well, I --

THE COURT: If they -- if they wanted to say that it did apply. So, I'm offering you an opportunity,

APPENDIX J

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----------x

COMMONWEALTH OF VIRGINIA, :

vs. : CRIMINAL NO.79148

MIR AIMAL KASI :

a/k/a MIR AIMAL KANSI, :

Defendant. :

----------x

Courtroom No. 4H

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

pursuant to any kind of legal process.

And for all those reasons, Your Honor, the Commonwealth has not shown that the manner of this seizure was reasonable and therefore had the Court ruled that the fourth amendment applied to Mr. Kasi, we would ask that the Court suppress the evidence because the manner of the seizure was unreasonable.

THE COURT: I think that the argument points up why you just can't apply the fourth amendment to a foreign national seized, I'll use your word seized. I think my word arrest is not the right word, with all of the other baggage that it carries, why you can't apply the fourth amendment to a seizure in a foreign country of a foreign national.

Mr. -- I think Mr. Horan stipulated that the FBI didn't have any jurisdiction there. So it is like a citizen doing this and the citizen seized Mr. Kasi, turned him over to a foreign country, later was -- received him back and brought him back here. And it is simply not within any fourth amendment idea. It's reasonable but not if you -- not if you're going to require that they have some kind of jurisdiction in the foreign country, because they don't.

So I think it's a circular argument and I wasn't as successful in getting to a point where I could make it clear for an Appellate Court as I had hoped, because you -- I'm chasing my tail. It -- the fourth amendment simply doesn't apply. But you have other motions.

MR. GOEMANN: Yes, Your Honor.

THE COURT: Okay.

MR. ROMANO: I think we're at a point where again, we say the fifth amendment applies and Mr. Horan says, no it doesn't.

THE COURT: Let's see, now which --

MR. ROMANO: Motion to Suppress the statement allegedly made to a Sheriff's deputy.

THE COURT: Okay.

MR. ROMANO: Your Honor, we've been apprised of the fact by Mr. Horan that supposedly there was a statement made by Mr. Kasi to a Sheriff's deputy on July 24th. We'd move to suppress it as violating the fifth amendment.

If the Commonwealth -- our position is that the Commonwealth intends to introduce this statement. They have to prove that it is constitutionally valid.

APPENDIX K

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	**CRIMINAL NO. 79148**
VERSUS	)	
MIR AIMAL KANSI	)	**INDICTMENT – CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Count II), MAIMING (Count III, IV, V) and USING A FIREARM IN THE COMMISSION OF A FIREARM IN THE COMMISSION OF A FELONY (Count VI, VII, VIII, IX, X)**

On October 20, 1997, the Commonwealth's Attorney, the Defendant, MIR AIMAL KANSI, and Richard Goemann, Crystal Meleen, Frank Romano, Judith Barger, Counsel for the Defendant, appeared before this court. The Defendant is indicted with the felonies of CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Count II), MAIMING (Count III, IV, V) and USING A FIREARM IN THE COMMISSION OF A FIREARM IN THE COMMISSION OF A FELONY (Count VI, VII, VIII, IX, X) and he appeared while in custody.

This case came before this Court today for hearings on motions filed by Counsel for the Defendant.

The Commonwealth's Attorney stipulated that the Defendant was arrested in Pakistan by the F.B.I.; the F.B.I. agent who arrested him did not have jurisdiction in Pakistan; the

Defendant was not taken before a judicial officer until he was returned to the United States; there was no compliance with the Vienna Convention prior to his arrival in the United States; the seizure of the Defendant was not made pursuant to any Pakistanian paper or document.

The Court, after hearing argument of Counsel, granted the Defendant's Motion to dismiss the Rule to Show Cause for the Immigration and Naturalization Service.

The Court, after ruling that a state court has no jurisdiction to hold a federal agency in contempt, dismissed Rules to Show Cause for the Central Intelligence Agency and the Federal Bureau of Investigation.

The Court granted, without objection by the Commonwealth's Attorney, the Defendant's oral motion to continue the Motion to Change Venue. The Court ORDERED that the Motion to Change Venue be continued until October 27, 1997 at 10:00 a.m..

The Court, after hearing argument, granted Counsel for the Defendant's oral Motion to Continue the Motion to Suppress as it pertains to the Defendant's Seizure in Pakistan. The Court ORDERED that the Motion to Suppress as it pertains to the Defendant's Seizure in Pakistan be continued until October 27, 1997 at 10:00 a.m..

The Court heard evidence and argument of Counsel on Defendant's Motion to Suppress Statements made on June 17, 1997 on the ground that the statements were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Virginia Constitution, Motion to Suppress Statements on the ground that the statements were

obtained in violation of the Vienna Convention, and Motion to Dismiss the Indictment, or Alternatively, to Suppress Statements on the ground that the statements were obtained in violation of the laws of Virginia and Pakistan. Counsel for the Defendant moved orally to continue the Motions. The Court denied Defendant's Motion to Suppress Statements on all grounds, denied Defendant's Motion to Dismiss the Indictment, and denied Defendant's Motion to Continue.

The Court, after hearing argument, denied the Defense Motion to Dismiss the Indictment.

The Court granted, without objection by the Defendant or his Counsel, the Commonwealth's Attorney's motion to amend the indictment by striking the Defendant's last name and replacing it with the name "KASI " and the wording "A/K/A MIR AIMAL KANSI".

The Defendant was remanded to the custody of the Sheriff.

Entered on November 5, 1997.

S/_____
JUDGE J. HOWE BROWN

cc: Robert Horan, Commonwealth Attorney
Richard Goemann, Counsel for the Defendant \

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	:	
vs.	:	CRIMINAL
	:	NO.79148
MIR AIMAL KASI,	:	
a/k/a MIR AIMAL KANSI	:	
Defendant.	:	

Courtroom No. 5G

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 27, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:02 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth's Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

THE COURT: Anything else you want to say, Mr. Goemann, about that?

MR. GOEMANN: No; Your Honor.

THE COURT: All right; I do not find -- well, I find that the Treaty -- I find that the Treaty is a matter of -- between the United States government and the government of Pakistan. It does not afford any individual an individual right to have the Treaty followed or not followed or to get the case dismissed if it is or isn't followed.

Mr. Kasi is before the Court now and we have the jurisdiction to try him for the alleged crimes here. So I deny the motion. The next motion.

MR. GOEMANN: Your Honor, If I could just ask if certain witnesses are present in the Courtroom?

THE COURT: All right.

MR. GOEMANN: Jeff Frederick, Bill Rich, Christian Orchetty [ph].

(No response.)

MR. ROMANO: Your Honor, I have two motions which I believe are resolvable. One is, a notice and motion for daily transcript of the proceedings.

THE COURT: Uh-huh.

APPENDIX M

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COURT

----------x

COMMONWEALTH OF VIRGINIA, :

vs. :

MIR AIMAL KASI : CRIMINAL

a/k/a MIR AIMAL KANSI, : NUMBER 79148

Defendant. :

----------:

Courtroom No. 4H

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

Constitutional violation. That's what the Judge was talking about and that's what the quote comes from, that part of the opinion.

There's a second issue and that was because you didn't read him his rights or tell him of his right to contact the consulate pursuant to the Vienna Convention his guilty plea was not a knowing and voluntary and intelligent guilty plea.

And that's as close to the argument that we're asserting that I can get. And the Court did recognize that that may have been a defense but said it was procedurally defaultive. It never ruled on it, Your Honor.

So that is the issue that we are addressing now. We are not arguing that the Vienna Convention creates a Constitutional right. What we're saying is that when you interrogate someone, when a police officer interrogates someone who is in custody that for the waiver of his 5th Amendment rights to be a knowing and voluntary and intelligent waiver as is prescribed by Miranda he must be informed of his rights pursuant to the Vienna Convention to contact the consulate of his country.

THE COURT: I deny that motion to suppress. I

think although it's almost mathematical, I think I can show you that your argument is circular and can't lead anywhere because it just runs around in a circle and one piece of it depends on the other piece of it, depends on the other piece of it until you come back to the beginning.

The rights that Miranda requires be informed and informantly waived are Constitutional rights. If the rights, if there are any, under the Vienna Convention are not Constitutional rights as beyond for adventure they are not, would have no more efficacy than a statute and you can't say that's something that ought to be put into Miranda because Miranda only talks about Constutional rights.

And if you're confused about what I said I think that demonstrates that your argument must fail, that particular argument. The best argument that you've got, and I can read this around the periphery, although it may have been the very point you were trying to make, although maybe you didn't try to make it as all and will wonder what I'm talking about. But what I think is the best argument is one of the factors that should be considered in considering voluntariness is whether he had some other

rights that were not taken account of. And maybe that's a factor, except for two things.

1. I find that the Vienna Convention does not create any individual rights. It's not an individual right treaty. It's a treaty between nations and it can't give rise to an individual right that an individual can claim.

But secondly and more importantly, at best it's only part of the picture here. And even if you include it in the totality of the circumstances his waiver of the Constitutional rights that he was clearly told about and that he clearly waived on the Miranda form was a voluntary waiver of those rights.

And, again, his education is very important. If he didn't know anything about the Constitutional he sure didn't know anything about the Vienna Convention. But he was told these are rights that you have and you're waiving them and the fact that he wasn't told about some other right that you think he might have had doesn't affect the voluntariness in the totality of the circumstances of the waiver that he made.

I guess if anybody can make sense of that we can move on with it. But in any event, I deny that motion

to suppress.

And I just have one left so I guess that must be –

MS. MELEEN: You do, Your Honor. And that is entitled motion to dismiss the indictment, the one with the dismissal.

THE COURT: Okay.

MS. MELEEN: Your Honor, I intend to follow very closely with the memorandum in support of the motion on this one because it is difficult to articulate and very specific and so I intend to go through them at random with Your Honor.

Virginia Code 19.2-80 sets forth the requirements that a law enforcement officer making arrest under a capias which you will notice that the language of this is – I know a lot more than I did when I typed this, let's put it that way, Your Honor.

This is some of the information that we were trying to get as a result of our subpoena request and so you can set where we were at a disadvantage by not having this information.

But the argument goes that when an arrest is made the law enforcement officer is required to bring the

APPENDIX N

VIRGINIA **11/3/97 s/ JHB**

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

VERSUS **CRIMINAL NO. 79148**

MIR AIMAL KASI **INDICTMENT – CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Court II), MAIMING (Count III, IV, V) and USING A FIREARM IN THE COMMISSION OF A FIREARM IN THE COMMISSIONOF A FELONY (Count VI, VII, VIII, IX, X)**

On October 20,1997, the Commonwealth's Attorney, the Defendant, MIR AIMAL KANSI, and Richard Goemann, Crystal Meleen, Frank Romano, Judith Barger, Counsel for the defendant, appeared before this court. The Defendant is indicted with the felonies of CAPITAL MURDER (Count I), FIRST DEGREE MURDER (Count II), MAIMING (Count II, IV, V) and USING A FIREARM INTHE COMMISSION OF A FIREARM IN THE COMMISSION OF A FELONY (Count VI, VII, VII, IX, X) and he appeared while in custody.

This case came before this Court today for hearings on motions filed by Counsel for the Defendant.

The Commonwealth's Attorney stipulated that the Defendant was arrested in Pakistan by the F.B.I.; the F.B.I. agent who arrested him did not have jurisdiction in Pakistan; the

Defendant was not taken before a judicial officer until he was returned to the United States; there was no compliance with the Vienna Convention prior to his arrival in the United States; the seizure of the Defendant was not made pursuant to any Pakistanian paper or document.

The Court, after hearing argument of Counsel, granted the Defendant's Motion to dismiss the Rule to Show Cause for the Immigration and Naturalization Service.

The Court, after ruling that a state court has no jurisdiction to hold a federal agency in contempt, dismissed Rules to show cause for the Central Intelligence Agency and the Federal Bureau of Investigation.

The Court granted, without objection by the Commonwealth's Attorney, the Defendant's oral motion to continue the Motion to Change Venue. The Court ORDERED that the Motion to Change Venue be continued until October 27, 1997 at 10:00 a.m.

The Court, after hearing argument, granted Counsel for the Defendant's oral Motion to Continue the Motion to suppress as it pertains to the Defendant's Seizure in Pakistan. The Court ORDERED that the Motion to Suppress as it pertains to the Defendant's Seizure in Pakistan be continued until October27, 1997 at10:00 a.m.

The Court heard evidence and argument of Counsel on Defendants 's Motion to Suppress Statements made on June 17, 1997 on the ground that the statements were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Virginia Constitution, Motion to Suppress Statements on the ground that the statements were

obtained in violation of the Vienna Convention, and Motion to Dismiss the Indictment, or Alternatively, to Suppress Statements on the ground that the statements were obtained in violation of the laws of Virginia and Pakistan. Counsel for the Defendant moved orally to continue the Motions. The Court denied the Defendant's Motion to suppress Statements on all grounds, denied Defendant's Motion to Dismiss the Indictment, and denies Defendant's Motion to Continue.

The Court, after hearing argument, denied the Defense Motion to Dismiss the Indictment.

The Court granted, without objection by the Defendant or his Counsel, the Commonwealth's Attorney's motion to amend the indictment by striking the Defendant's last name and replacing it with the name "KASI" and the working "A/K/A MIR AIMAL KANSI".

The Defendant was remanded to the custody of the Sheriff.

Entered on November 5, 1997.

s/_____

JUDGE J.HOWE BROWN

cc: Robert Horan, Commonwealth Attorney

Richard Goemann, Counsel for the Defendant

APPENDIX O

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----------x

COMMONWEALTH OF :
VIRGINIA, :
vs. : CRIMINAL NUMBER 79148
MIR AIMAL KASI :
a/k/a MIR AIMAL KANSI, :
Defendant. :

----------x

Courtroom No. 4H
Fairfax County Judicial Center
Fairfax, Virginia
Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES: On Behalf of the Commonwealth:

Robert Horan, Esquire
Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire
Frank Romano, Esquire
Crystal A. Meleen, Esquire
Judith Barger, Esquire
OFFICE OF THE PUBLIC DEFENDER

Sharon has even said today that there's a valid government regulation. They cite Toohey which says if there is one, the government official can come in here and deny it. There has yet to be a statement by the government on any -- of any agency that there's a valid government regulation by which they may take themselves out of the purview of a subpoena that was issued by this Court.

THE COURT: We can, as Judges, sometimes by cajoling and bullying and pushing get things done that we know we can't do if push comes to shove, and push has come to shove and I'm not going to do something that doesn't -- that I can't enforce any further. This needs to come to an end.

I don't find there's any jurisdiction of a state court to hold a federal official in contempt for failing to respond to a state court's subpoena. And for that, and the other reasons stated by Ms. Sharon, the rule to show cause is dismissed.

MR. ROMANO: Your Honor, would you please note our exception?

THE COURT: Yes.

MR. ROMANO: For purposes of the record.

THE COURT: Of course.

APPENDIX P

VIRGINIA :

FILED
CRIMINAL
97 OCT 22 AM 8:21
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINAI :

vs. : Criminal No. K79148

MIR AIMAL KANSI :

RECEIVED
97 OCT 16 AM 8:56
OFFICE OF THE SHERIFF
FAIRFAX COUNTY, VIRGINAI

RULE TO SHOW CAUSE

Upon motion of the Defendant and after consideration of the affidavit filed herein, it is hereby

ORDERED, that the Office of the Sheriff serve this Rule to Show Cause upon the Custodian of Records for the Central Intelligence Agency, c/o CIA Headquarters, 930 Dolley Madison Blvd., McLean, Virginia; and it is further

ORDERED, that the custodian of Records for Central Intelligence Agency appear before this Court on October 20, 1997, at 10:00 a.m., to show cause why said Custodian should not be held in contempt for failing to respond to a subpoena dues tecum issued by this court.

S/15 October 1997 S/_____

Date Judge Howe Brown

APPENDIX Q

VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINAI :

vs. : Criminal No. K79148

MIR AIMAL KANSI :

RULE TO SHOW CAUSE

Upon motion of the Defendant and after consideration of the affidavit filed herein, it is hereby

RECEIVED
97 OCT 16 AM 8:56
OFFICE OF THE SHERIFF
FAIRFAX COUNTY, VIRGINIA

ORDERED, that the Office of the Sheriff serve this Rule to Show Cause upon the Custodian of Records for the Federal Bureau of Investigation, 7799 Leesburg Pike, Falls Church, Virginia; and it is further

ORDERED, that the Custodian of Records for the Federal Bureau of Investigation appear before this Court on October 20, 1997, at 10:00 a.m., to show cause why said Custodian should not be held in contempt for failing to respond to a subpoena dues tecum issued by this court.

S/15 October 1997

S/_____

Judge J. Howe Brown

Executed in Fairfax County, Virginia, the
16th day of Oct., 1997, 11:14 a.m.
by delivering a true copy of the within mentioned
papers to
Ed Williams (Supervisory Special Agent)
For Federal Bureau of Investigation

Carl R. Peed, SHERIFF

By:S/_____

Deputy Sheriff

APPENDIX R

EXTRADITION

Treaty and exchanges of notes signed at London December 22, 1931

Senate advice and consent to ratification February 19, 1932

Ratified by the President of the United States March 3, 1932

Ratified by the United Kingdom July 29, 1932

Ratifications exchanged at London August 4, 1932

Proclaimed by the President of the United States August 9, 1932

Entered into force June 24, 1935

47 Stat. 2122; Treaty Series 849

TREATY

The President of the United States of America.

And His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India;

Desiring to make more adequate provision for the reciprocal extradition of criminals,

Have resolved to conclude a Treaty for that purpose, and to that end have appointed as their plenipotentiaries:

The President of the United States of America;

General Charles G. Dawes, Ambassador Extraordinary and Plenipotentiary of the United States of America at the Court of St. James;

And His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India;

for Great Britain and Northern Ireland;

The Right Honourable Sir John Simon, G.C.S.I., M.P., His Principal Secretary of State for Foreign Affairs;

who, having communicated their full powers, found in good and due form, have agreed as follows:

ARTICLE I

The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

ARTICLE 2

For the purposes of the present Treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions overseas other than those enumerated in Article 14, together with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

ARTICLE 3

Extradition shall be reciprocally granted for the following crimes or offences:

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.
2. Manslaughter.
3. Administering drugs or using instruments with intent to procure the miscarriage of women.
4. Rape.
5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.
6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.
7. Kidnapping or false imprisonment.
8. Child stealing, including abandoning, exposing or unlawfully detaining.
9. Abduction.
10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person provided that such crime or offence is punishable by imprisonment for at least one year or by more severe punishment.

11. Bigamy.

12. Maliciously wounding or inflicting grievous bodily harm.

13. Threats, by letter or otherwise, with intent to extort money or other things of value.

14. Perjury, or subornation of perjury.

15. Arson.

16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.

17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.

18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.

19. *(a)* Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.

(b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.

20. Forgery, or uttering what is forged.

21. Crimes or offences against bankruptcy law.

22. Bribery, defined to be the offering, giving or receiving of bribes.

23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.

24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.

25. Malicious injury to property, if such crime or offence be indictable.

26. *(a)* Piracy by the law of nations.

(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties.

ARTICLE 4

The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

ARTICLE 5

The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution

or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

ARTICLE 6

A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

ARTICLE 7

A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

ARTICLE 8

The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

ARTICLE 9

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for

trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

ARTICLE 10

If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date, unless such claim is waived.

ARTICLE 11

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

ARTICLE 12

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offence shall be given up when the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

ARTICLE 13

All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

ARTICLE 14

His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named – that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland – and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice comes into effect the territory of the Dominion concerned or of India shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.[1]

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty has acceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

---

[1] The Treaty was made applicable from Aug. 30, 1935, to Australia (including Papua, Norfolk Island, and mandated territories of New Guinea and Naura) and Newfoundland. (It ceased to apply to Newfoundland, however, when Newfoundland entered the Confederation of Canada on Mar. 31, 1949.) It was also made applicable to Burma from Nov. 1, 1941, and to India from Mar. 9, 1942.

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

ARTICLE 15

The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory; provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

ARTICLE 16

This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Nigeria Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Protectorate, Swaziland, Uganda Protectorate and Zazibar, and to the following territories in respect to which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

ARTICLE 17

If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British-protected State, or to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.[2]

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[2] The treaty was made applicable from June 24, 1935, to Palestine and Transjordan (see exchanges of notes, below); from July 31, 1939, to the Federated Malay States (Negri, Sembilan, Pahang, Perak and Sebangor), Brunei and North Borneo; and from Aug. 1, 1966, to Tonga.

ARTICLE 18

The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 [X] of the treaty of the 9th August, 1842,[3] of the convention of the 12th July, 1889,[4] of the supplementary Convention of the 13th December, 1900,[5] and of the supplementary Convention of the 12th April, 1905,[6] relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other treaty arrangements.

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[3] TX 119, sale, p. 88.

[4] TX 139, sale, p. 211.

[5] TX 391, sale, p. 236.

[6] TX 458, sale, p. 272.

In faith whereof the above-named plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London this twenty-second day of December, 1931.

CHARLES G. DAWS [SEAL]

JOHN SIMON [SEAL]

EXCHANGES OF NOTES

The Secretary of State for Foreign Affairs to the American Ambassador

FOREIGN OFFICE, S.W. 1.
22ND December, 1931

YOUR EXCELLENCY,

With reference to Article 17 of the Extradition Treaty between His Majesty The King of Britain, Ireland and the British Dominions beyond the Seas and the President of the United States of America, signed this day at London, I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom desire that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Palestine (excluding Transjordan).

2. I have accordingly the honour to enquire whether the United States Government agree with this proposal. In this event the present note and Your Excellency's reply to that effect will be regarded as placing on record the agreement arrived at in the matter.

I have the honour to be, with the highest consideration,

Your Excellency's obedient Servant,

JOHN SIMON

His Excellency

General CHALRES G. DAWES, C.B.,

Etc., etc., etc.

The American Ambassador to the Secretary of State for Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
LONDON, *December 22, 1931*

SIR:

With reference to Article 17 of the Extradition Treaty between the President of the United States of America and His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, signed this day at London, I have the honor to inform you that the Government of the United States of America is agreeable to the proposal of His Majesty's government in the United Kingdom that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Palestine (excluding Transjordan).

I have the honor to be, with the highest consideration, Sir,

Your most obedient, humble Servant,

CHARLES G. DAWES

The Right Hon
Sir JOHN SIMON, G.C.S.I., *etc., etc., etc.,*
Foreign Office, S.W. 1.

The Secretary of State for Foreign Affairs to the American Ambassador

FOREIGN OFFICE, S.W. 1.

22nd December, 1931

YOUR EXCELLENCY

With reference to Article 17 of the Extradition Treaty between His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas and the President of the United States of America, signed this day at London, I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom desire that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Transjordan.

2. I have accordingly the honour to enquire whether the United States Government agree with this proposal. In this event the present note and Your Excellency's reply to that effect will be regarded as placing on record the agreement arrived at in the matter.

I have the honour to be, with the highest consideration,

Your Excellency's obedient Servant,

JOHN SIMON

His Excellency

General CHARLES G. DAWES, C.B.,

etc., etc., etc.

The American Ambassador to the Secretary of State for Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA

LONDON, *December 22, 1931*

SIR:

With referenced to Article 17 of the Extradition Treaty between the President of the United States of America and His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, signed this day at London, I have the honor to inform you that the Government of the United States of America is agreeable to the proposal of His Majesty's Government in the United Kingdom that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Transjordan.

I have the honor to be, with the highest consideration, Sir,

Your most obedient, humble Servant,

CHARLES G. DAWES

The Right Hon

Sir JOHN SIMON, G.C.S.I., *etc., etc., etc.,*

Foreign Office, S.W. 1.

APPENDIX S
Extradition Act, 1972
(ACT XXI of 1972)

An Act to consolidate and amend the law relating to the extradition of fugitive offenders

25th September 1972

Whereas it is expendient [sic] to consolidate and amend the law relating to the extradition of fugitive offenders:

It is hereby enacted as follows: –

CHAPTER I – PRELIMINARY

1. *Short title, extent commencement and application – (1)* This Act may be called the Extradition act, 1972.

(2) It extends to the whole of Pakistan.

(3) It shall come into force on such date as the Federal Government may, by notification in the official Gazette, appoint.

(4) It shall apply in relation to the return of persons to and to persons returned from, –

(a) a treaty State, subject to a declaration under section 3, if any; and

(b) a foreign State not being a treaty State, subject to a direction under section 4.

2. *Definition* – (1) In this Act, unless there is anything repugnant in the subject or context…–

(a) "extradition offence" means an offence the act of omission constituting which falls within any of the descriptions set out in the Schedule and, if it took place within, or within the jurisdiction of, Pakistan, would constitute an offence against the law of Pakistan and also –

(i) in the case of treaty State, an offence a person accused of which is, under the extradition treaty with that State, to be returned to or from that State; and

(ii) in the case of a foreign State not being a treaty State, an offence specified in a direction issued under section 4;

(b) "extradition treaty" means a treaty or agreement between Pakistan and a foreign State for the extradition to or from such State of a person accused or convicted of an extradition offence;

(c) "foreign State" includes every constituent part, colony or dependency of such State;

(d) "fugitive offender" means the person who, being accused or convicted of an extradition offence is, or is suspected to be, in any part of Pakistan;

(e) "prescribed" means prescribed by rules made under this Act;

(f) "treaty State" means a foreign State with which an extradition treaty is for the time being in operation.

(2) In determining for the purposes of this Act whether an offence against the law of a foreign State falls within a description set out in the Schedule, any special intent or state or mind or special circumstances of aggravation which may be necessary to constitute that offence under the law shall be disregarded.

3. *Treaty State* – (1) As soon as may be after the commencement of this Act, the Federal Government shall publish in the official Gazette a list of the foreign State with which an extradition treaty is in operation, specifying in respect of each such

(3) A declaration under subsection (2) in relation to foreign State shall specify the offences persons accused of which are, under the extradition treaty with that State, to be returned to or from that State and may provide that this Act shall apply in relation to that State with such modification as may be set out therein; and the provision of this Act shall have effect accordingly.

4. *Application of Act to non-treaty States* – (1) Where the Federal Government considers it expedient that the persons who, being accused or convicted of offence at places within, or within the jurisdiction of, a foreign State, are or are suspected to be in Pakistan should be returned to that State, notwithstanding that there is no extradition treaty with that state, it may, by notification in the official Gazette, direct that the provisions of this Act, shall, with respect to such offences and subject to such modifications, exceptions, conditions and qualifications, if any, as may be specified therein, have effect in relation to that State.

(2) Where a direction under subsection (1) in relation to a foreign State is in force, the provisions of this Act shall, with respect to the offences specified in that direction; have effect in relation to such State as if it were a treaty State.

CHAPTER II – SURRENDER OF FUGITIVE OFFENDERS

5. *Liability of fugitive offenders to be surrendered.* – (1) Subject to the provisions of subsection (2), every fugitive offender shall be liable to be apprehended and surrendered in the manner provided in this act, whether the offence in respect of which his surrender is sought was committed before or after the commencement of this Act and whether or not a Court in Pakistan has jurisdiction to try that offence.

(2) No fugitive offender shall be surrendered –

(a) if the offence in respect of which his surrender is sought in a political character or if it is shown to the satisfaction of the Federal Government or of the Magistrate or Court before whom he may be produced that the requisition for his surrender has, in fact been made with a view to his being tried or punished for an offence of a political character;

(b) if the offence in respect of which his surrender is sought is punishable with death or with imprisonment for life or a term which is not less than twelve months;

(c) if the prosecution for the offence in respect of which the surrender sought is, according to the law of the State asking for the surrender, barred by time;

(d) if there is no provision in the law of, or in the extradition treaty with the State asking for the surrender that the fugitive offender shall not, until he has been restored or has had an opportunity of returning to Pakistan, be detained or tried in that State for any offence committed prior to his surrender other than the extradition offence proved by the facts on which the surrender is based;

(e) if it appears to the Federal Government that he is accused or alleged to have been convicted of such no offence that if he were charged with the offence in Pakistan he would be entitled to be discharged under any law relating to previous acquittal or conviction;

(f) if he has been accused of some offence in Pakistan, not being the offence for which his surrender is sought, or is undergoing sentence under any conviction in Pakistan, until after he has been discharged, whether by acquittal or on the expiration of his sentence or otherwise;

(g) if it is shown to the satisfaction of the Federal Government or of the Magistrate or Court before whom he may be produced that he might if surrendered by prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

6. *Requisition for surrender of fugitive offender* – A requisition for the surrender of a fugitive offender shall be made to the Federal Government –

(a) by a diplomatic representative in Pakistan of the State asking for the surrender; or

(b) by the Government of the State asking for the surrender through the diplomatic representative of Pakistan in that State; or

(c) in such other manner as may have been settled by arrangement between the Federal Government and the Government of the State asking for the surrender.

7. *Order of Magistrial enquiry* – Where a requisition is made under section 6, the Federal Government may, if it thinks fit, issue an order to enquire into the case to any Magistrate of the first class who would have had jurisdiction to enquire into the extradition offence to which the requisition relates if it had been an offence committed within the local limits of his jurisdiction.

8. *Magisterial enquiry* – (1) On receipt of an order under section 7, the Magistrate shall issue a summon or a warrant for the arrest of the fugitive offender according as the cause appears to be one in which according to the law of Pakistan a summon or warrant would ordinarily issue.

(2) When the fugitive offender appears or is brought before him, the Magistrate shall enquire into the case in the same

manner, and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a Court of Session and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive offender, including any evidence to show that the offence of which the fugitive offender is accused or alleged to have been convicted is an offence of a political character or is not an extradition offence.

9. *Receipt in evidence of exhibits, depositions, etc.* – (1) In any proceeding against a fugitive offender under this Act, exhibits and depositions, whether or not they are received or taken in the presence of the person against whom they are used, and copies thereof, and official certificates of facts and judicial documents stating facts, may, if duly authenticated, be received as evidence.

(2) Warrants, depositions or statements on oath which purport to have been issued, received or taken by any Court of Justice outside Pakistan, or copies thereof, and certificates of, or judicial documents stating the fact of, conviction before any such Court, shall be deemed dully authenticated –

(a) if the warrant purports to be signed by a Judge, Magistrate, or officer of the State where the same was issued or acting in or for such State;

(b) if the depositions or statements or copies thereof purport to be certified, under the hand of a Judge, Magistrate or officer of the State where the same were taken or acting in or for such State, to be the original depositions or statements or to be true copies thereof, as the case may require;

(c) if the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a Judge,

Magistrate or officer of the State where the conviction took place or acting in or for such State; and

(d) if the warrant, depositions, statements, copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a minister of the State where the same were respectively issued, taken or given.

(3) For the purposes of the section, "warrant" includes any judicial document authorising the arrest of any person accused or convicted of an offence.

10. *Magistrate to report after the enquiry* – If, after the enquiry under section 8, the Magistrate is of opinion –

(a) that a *prima facie* case has not been made out in support of the requisition for surrender of the fugitive offender, he shall discharge the fugitive offender and make a report to that effect to the Federal Government;

(b) that a *prima facie* case has been made out in support of such requisition, he shall –

(i) report the result of his enquiry to the Federal Government;

(ii) forward, together with such report, any written statement which fugitive offender may desire to submit for the consideration of the Federal Government; and

(iii) subject to any provision relating to bail, commit the fugitive offender prison to await the orders of the Federal Government.

11. *Removal and delivery of the fugitive offender* – If, upon receipt of report and statement under clause (b) of section 10, the Federal Government is of opinion that the fugitive offender

ought to be surrendered, it may by warrant for the custody and removal of the fugitive offender and for the delivery at a place and to a person to be named in the warrant:

Provided that the fugitive offender shall not be so delivered until after the expiration of fifteen days from the date he has been taken in custody by such warrant.

12. *Discharge of person apprehended if not surrendered within two months* – If a fugitive offender who, in pursuance of this Act, has been taken into custody to await his surrender is not conveyed out of Pakistan within two months after such committial, the High Court, upon application made to it by or on behalf of the fugitive offender and upon proof that reasonable notice of the intention to make such application has been given to the Federal Government, may order such prisoner to be discharged unless sufficient cause is shown to the contrary.

13. *Powers to the Federal Government to discharge a fugitive offender* – If it is appears to the Federal Government that by reason of the trivial nature of the case or by reason of the application for the surrender of a fugitive offender not being made in good faith or in the interest of justice or for any other reason it would be unjust or inexpedient to surrender the fugitive offender, it may, by summons or warrant issued under this Act to be cancelled and the fugitive offender, if he is in custody or under detention, to be discharged.

14. *Simultaneous requisitions* – If requisitions for the surrender of a fugitive offender are received from more than one treaty State, the Federal Government may, having regard to the circumstances of the case, surrender the fugitive offender to such State as it may think fit.

would be unjust or inexpedient to surrender the fugitive offender, it may, by summons or warrant issued under this Act to be cancelled and the fugitive offender, if he is in custody or under detention, to be discharged.

14. *Simultaneous requisitions* – If requisitions for the surrender of a fugitive offender are received from more than one treaty State, the Federal Government may, having regard to the circumstances of the case, surrender the fugitive offender to such State as it may think fit.

CHAPTER III – SURRENDER TO PAKISTAN OF PERSONS ACCUSED OF EXTRADITION OFFENCES

15. *Requisition for surrender of persons to Pakistan* – A requisition for the surrender to Pakistan of a person who, being accused or convicted of an extradition offence was or is suspected to be in treaty State may be made by the Federal Government –

(a) to the diplomatic representative in Pakistan of that State;

(b) to the Government of that State through the diplomatic representatives of Pakistan in that State; or

(c) in such other manner as may have been settled by arrangement between the Federal Government and the Government of that State.

16. *A person surrendered by a treaty State not to be tried for previous offences* -- A person surrendered by a treaty State pursuant of a requisition under section 15 shall not, until he has been restored or has had an opportunity of returning to that State, be tried in Pakistan for an offence committed prior to the surrender, other than the extradition offence proved by the facts on which the surrender is based.

(b) he is acquitted or discharged on his trial for that offence.

CHAPTER IV – MISCELLANEOUS

18. *Jurisdiction as to offences committed at sea or in air* – Where the offence in respect of which the surrender of a fugitive offender is sought was committed on board any vessel on the high seas or any aircraft in the air outside Pakistan or the Pakistan territorial waters and such vessel or aircraft comes into any port or aerodrome of Pakistan with the fugitive offender on board, the Federal Government and any Magistrate having jurisdiction in such port or aerodrome may exercise the powers conferred on it or him by this Act.

19. *Release of persons arrested on bail* – The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), relating to bail shall apply to a fugitive offender arrested or detained under this Act in the same manner as they would apply if he were accused of committing in Pakistan the offence of which he is accused or has been convicted; and in relation to such bail the Magistrate before whom he is brought shall have, as far as may be, the same powers and jurisdiction as a Court of Session under that Code.

20. *Property found on fugitive offender* -- Everything found in the possession of a fugitive offender at the time of his arrest which may be material as evidence in proving the extradition offence may be delivered up with the fugitive offender on his surrender, subject to the rights, if any, of third parties with respect thereto.

21. *Lawfulness of custody and re-taking under warrant issued under Act* – It shall be lawful for any person to

whom a warrant is directed in pursuance of the provisions of this Act to receive, hold in custody and convey the fugitive offender mentioned in the warrant to the place named in the warrant, and, if such offender escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of Pakistan may be re-taken upon an escape.

22. *Power to make rules* – (1) The Federal Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: –

(a) the form in which a requisition for the surrender of a fugitive offender may be made;

(b) the removal of fugitive offenders apprehended or in custody under this Act and their control and maintenance until such time as they are handed over to the persons entitled to receive them;

(c) the seizure and disposition of any property which is the subject of or required for proof of, any alleged offence with respect to which this Act applies; and

(d) the form and manner in which the Magistrate may be required to make his report to the Federal Government under this Act.

23. *Power to amend the Schedule* – The Federal Government may, by notification in the official Gazette, amend the Schedule so as to add any entry thereto or modify or omit any entry therein.

24. *Repeal* – The Extradition Act, 1903 (XV of 1903), is hereby repealed.

THE SCHEDULE

[See section 2(1)(a)]

EXTRADITION OFFENCES

1. Culpable homicide.

2. Maliciously or wilfully wounding grievous bodily harm.

3. Rape.

4. Procuring or trafficking in women or young persons for immoral purposes.

5. Kidnapping, abduction or false imprisonment or dealing in slaves.

7. Bribery.

8. Perjury or subornation or perjury or conspiring to defeat the course of justice.

9. Arson.

10. An offence concerning counterfeit currency.

11. An offence against the law relating to forgery.

12. Stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false pretences receiving stolen property or any other offence in respect of property involving fraud.

13. Burglary, house-breaking or any similar offence.

14. Robbery.

15. Blackmail or extortion by means of threats or by abuse of authority.

16. An offence against bankruptcy law or company law.

17. Malicious or wilful/damage to property.

18. Acts done with the intention of endangering vehicles, vessels or aircraft.

19. An offence against the law relating to dangerous drugs or narcotics.

20. Piracy.

21. Revolt against the authority of the master of a ship or the commander of an aircraft.

22. Contravention of import or export prohibitions relating to precious stones, gold and other precious metals.

23. Aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the aforesaid offences.

APPENDIX T
UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS

VIENNA CONVENTION ON CONSULAR RELATIONS

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind, the Purposes and Principles of the Charter of the United Nations[1] concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature of 10 April 1961,[2]

Believing, that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges an immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming, that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed, as follows: . . .

Article 36: Communication and Contact with Nationals of the Sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers

shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action; 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended...

APPENDIX U

28 CFR Ch. XVI

Subpart B--Production or Disclosure in Federal and State Proceedings

16.21 Purpose and scope.

16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party.

16.23 General disclosure authority in Federal and State proceedings in which the United States is a party.

16.24 Procedure in the event of a demand where disclosure is not otherwise authorized.

16.25 Final action by the Deputy or Associate Attorney General.

16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

16.27 Procedure in the event a department decision concerning a demand is not made prior to the time a response to the demand is required.

16.28 Procedure in the event of an adverse ruling.

16.29 Delegation by Assistant Attorneys General.

Appendix to Subpart B--Redelegation of Authority to the Deputy Assistant Attorney General for Litigation, Antitrust Division, To Authorize Production or Disclosure of Material or Information

Subpart C--Production of FBI Identification Records in Response to Written Requests by Subjects Thereof

Sec. 16.21 Purpose and scope.

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term employee of the Department includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prosecutive, or regulatory agencies.

(d) This subpart is intended only to provide guidance for the internal operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any

right or benefit, substantive or procedural, enforceable at law by a party against the United States.

Sec. 16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party.

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with Secs. 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in Sec. 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.

Sec. 16.23 General disclosure authority in Federal and State proceedings in which the United States is a party.

(a) Every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the ``originating component'' as defined in Sec. 16.24(a) of this part, to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, as such attorney shall deem necessary or desirable to the discharge of the attorney's official duties: Provided, Such an attorney shall consider, with respect to any disclosure, the factors set forth in Sec. 16.26(a) of this part: And further provided, An attorney shall not reveal or furnish any material, documents, testimony or information when, in the attorney's judgment, any of the factors specified in Sec. 16.26(b) exists, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees (hereinafter referred to as "the EOUST""), or such persons' designees.

(b) An attorney may seek higher level review at any stage of a proceeding, including prior to the issuance of a court order, when the attorney determines that a factor specified in Sec. 16.26(b) exists or foresees that higher level approval will be required before disclosure of the information or testimony in question. Upon

referral of a matter under this subsection, the responsible Assistant Attorney General, the Director of EOUST, or their designees shall follow procedures set forth in Sec. 16.24 of this part.

(c) If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party's attorney setting forth a summary of the testimony sought must be furnished to the Department attorney handling the case or matter.

Sec. 16.24 Procedure in the event of a demand where disclosure is not otherwise authorized.

(a) Whenever a matter is referred under Sec. 16.22 of this part to a U.S. Attorney or, under Sec. 16.23 of this part, to an Assistant Attorney General, the Director of the EOUST, or their designees (hereinafter collectively referred to as the ``responsible official"), the responsible official shall immediately advise the official in charge of the bureau, division, office, or agency of the Department that was responsible for the collection, assembly, or other preparation of the material demanded or that, at the time the person whose testimony was demanded acquired the information in question, employed such person (hereinafter collectively referred to as the ``originating component"), or that official's designee. In any instance in which the responsible official is also the official in charge of the originating component, the responsible official may perform all functions and make all determinations that this regulation vests in the originating component.

(b) The responsible official, subject to the terms of paragraph (c)

of this section, may authorize the appearance and testimony of a present or former Department employee, or the production of material from Department files if:

(1) There is no objection after inquiry of the originating component;

(2) The demanded disclosure, in the judgment of the responsible official, is appropriate under the factors specified in Sec. 16.26(a) of this part; and

(3) None of the factors specified in Sec. 16.26(b) of this part exists with respect to the demanded disclosure.

(c) It is Department policy that the responsible official shall, following any necessary consultation with the originating component, authorize testimony by a present or former employee of the Department or the production of material from Department files without further authorization from Department officials whenever possible: Provided, That, when information is collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the Department or by the EOUST, the Assistant Attorney General in charge of such a division or the Director of the EOUST may require that the originating component obtain the division's or the EOUST's approval before authorizing a responsible official to disclose such information. Prior to authorizing such testimony or production, however, the responsible official shall, through negotiation and, if necessary, appropriate motions, seek to limit the demand to information, the disclosure of which would not be inconsistent with the considerations specified in Sec. 16.26 of this part.

(d)(1) In a case in which the United States is not a party, if the

responsible U.S. attorney and the originating component disagree with respect to the appropriateness of demanded testimony or of a particular disclosure, or if they agree that such testimony or such a disclosure should not be made, they shall determine if the demand involves information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department or the EOUST. If so, the U.S. attorney shall notify the Director of the EOUST or the Assistant Attorney General in charge of the division responsible for such litigation or investigation, who may:

(i) Authorize personally or through a Deputy Assistant Attorney General, the demanded testimony or other disclosure of the information if such testimony or other disclosure, in the Assistant or Deputy Assistant Attorney General's judgment or in the judgment of the Director of the EOUST, is consistent with the factors specified in Sec. 16.26(a) of this part, and none of the factors specified in Sec. 16.26(b) of this part exists with respect to the demanded disclosure;

(ii) Authorize, personally or by a designee, the responsible official, through negotiations and, if necessary, appropriate motions, to seek to limit the demand to matters, the disclosure of which, through testimony or documents, considerations specified in Sec. 16.26 of this part, and otherwise to take all appropriate steps to limit the scope or obtain the withdrawal of a demand; or

(iii) If, after all appropriate steps have been taken to limit the scope or obtain the withdrawal of a demand, the Director of the EOUST or the Assistant or Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney

General, for final resolution to the Deputy or Associate Attorney General, as indicated in Sec. 16.25 of this part.

(2) If the demand for testimony or other disclosure in such a case does not involve information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department, the originating component shall decide whether disclosure is appropriate, except that, when especially significant issues are raised, the responsible official may refer the matter to the Deputy or Associate Attorney General, as indicated in Sec. 16.25 of this part. If the originating component determines that disclosure would not be appropriate and the responsible official does not refer the matter for higher level review, the responsible official shall take all appropriate steps to limit the scope or obtain the withdrawal of a demand.

(e) In a case in which the United States is a party, the Assistant General or the Director of the EOUST responsible for the case or matter, or such persons' designees, are authorized, after consultation with the originating component, to exercise the authorities specified in paragraph (d)(1) (i) through (iii) of this section: Provided, That if a demand involves information that was collected, assembled, or prepared originally in connection with litigation or an investigation supervised by another unit of the Department, the responsible official shall notify the other division or the EOUST concerning the demand and the anticipated response. If two litigating units of the Department are unable to resolve a disagreement concerning disclosure, the Assistant Attorneys General in charge of the two divisions in disagreement, or the Director of the EOUST and the appropriate Assistant

Attorney General, may refer the matter to the Deputy or Associate Attorney General, as indicated in Sec. 16.25(b) of this part.

(f) In any case or matter in which the responsible official and the originating component agree that it would not be appropriate to authorize testimony or otherwise to disclose the information demanded, even if a court were so to require, no Department attorney responding to the demand should make any representation that implies that the Department would, in fact, comply with the demand if directed to do so by a court. After taking all appropriate steps in such cases to limit the scope or obtain the withdrawal of a demand, the responsible official shall refer the matter to the Deputy or Associate Attorney General, as indicated in Sec. 16.25 of this part.

(g) In any case or matter in which the Attorney General is personally involved in the claim of privilege, the responsible official may consult with the Attorney General and proceed in accord with the Attorney General's instructions without subsequent review by the Deputy or Associate Attorney General.

Sec. 16.25 Final action by the Deputy or Associate Attorney General.

(a) Unless otherwise indicated, all matters to be referred under Sec. 16.24 by an Assistant Attorney General, the Director of the EOUST, or such person's designees to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the matter is referred personally by or through the designee of an Assistant Attorney General who is within the general supervision of the Deputy Attorney General, or (2) to the Associate Attorney General, in all other cases.

(b) All other matters to be referred under Sec. 16.24 to the Deputy

or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the originating component is within the supervision of the Deputy Attorney General or is an independent agency that, for administrative purposes, is within the Department of Justice, or (2) to the Associate Attorney General, if the originating component is within the supervision of the Associate Attorney General.

(c) Upon referral, the Deputy or Associate Attorney General shall make the final decision and give notice thereof to the responsible official and such other persons as circumstances may warrant.

Sec. 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute, such as the income tax laws, 26 U.S.C. 6103 and 7213, or a rule of procedure, such as the grand jury secrecy rule, F.R.Cv.P., Rule 6(e);

(2) Disclosure would violate a specific regulation;

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal a confidential source or informant,

unless the investigative agency and the source or informant have no objection,

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired,

(6) Disclosure would improperly reveal trade secrets without the owner's consent.

(c) In all cases not involving considerations specified in paragraphs (b)(1) through (b)(6) of this section, the Deputy or Associate Attorney General will authorize disclosure unless, in that person's judgment, after considering paragraph (a) of this section, disclosure is unwarranted. The Deputy or Associate Attorney General will not approve disclosure if the circumstances specified in paragraphs (b)(1) through (b)(3) of this section exist. The Deputy or Associate Attorney General will not approve disclosure if any of the conditions in paragraphs (b)(4) through (b)(6) of this section exist, unless the Deputy or Associate Attorney General determines that the administration of justice requires disclosure. In this regard, if disclosure is necessary to pursue a civil or criminal prosecution or affirmative relief, such as an injunction, consideration shall be given to:

(1) The seriousness of the violation or crime involved,

(2) The past history or criminal record of the violator or accused,

(3) The importance of the relief sought,

(4) The importance of the legal issues presented,

(5) Other matters brought to the attention of the Deputy or Associate Attorney General.

(d) Assistant Attorneys General, U.S. Attorneys, the Director of the EOUST, U.S. Trustees, and their designees, are authorized to issue instructions to attorneys and to adopt supervisory practices, consistent with this subpart, in order to help foster consistent application of the foregoing standards and the requirements of this subpart.

Sec. 16.27 Procedure in the event a department decision concerning a demand is not made prior to the time a response to the demand is required. If response to a demand is required before the instructions from the appropriate Department official are received, the responsible official or other Department attorney designated for the purpose shall appear and furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate Department official and shall respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

Sec. 16.28 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with Sec. 16.27 of this chapter pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions rendered in accordance with Secs. 16.24 and 16.25 of this part not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall, if so directed by the responsible Department official, respectfully decline to comply

with the demand. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

Sec. 16.29 Delegation by Assistant Attorneys General.

With respect to any function that this subpart permits the designee of an Assistant Attorney General to perform, the Assistant Attorneys General are authorized to delegate their authority, in any case or matter or any category of cases or matters, to subordinate division officials or U.S. attorneys, as appropriate.

Appendix to Subpart B--Redelegation of Authority to the Deputy Assistant Attorney General for Litigation, Antitrust Division, To Authorize Production or Disclosure of Material or Information

1. By virtue of the authority vested in me by 28 CFR 16.23(b)(1) the authority delegated to me by that section to authorize the production of material and disclosure of information described in 28 CFR 16.21(a) is hereby redelegated to the Deputy Assistant Attorney General for Litigation, Antitrust Division.

2. This directive shall become effective on the date of its publication in the Federal Register.

[Order No. 960-81, 46 FR 52356, Oct. 27, 1981]

Subpart C--Production of FBI Identification Records in Response to Written Requests by Subjects Thereof

Source: Order No. 556-73, 38 FR 32806, Nov. 28, 1973, unless otherwise noted.

APPENDIX V

32 CFR Ch. XIX

Part 1905 - PRODUCTION OF OFFICIAL RECORDS OR DISCLOSURE OF OFFICIAL INFORMATION IN PROCEEDINGS BEFORE FEDERALSTATE OR LOCAL GOVERNMENT ENTITIES OF COMPETENT JURISDICTION

Sec.

1905.1 Scope and Purpose

1905.2 Definitions

1905.3 General

1905.4 Procedure for Production

AUTHORITY: 5 U.S.C. 403(d)(3); 50 U.S.C. 403g; United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951); E.O. 12333 §§1.8(i), 1.5(h), 3.2;E.O. 12356; U.S. v. Snepp, 444 U.S. 507 (1980).

SOURCE: 56 FR 41459, August 21,1991, unless otherwise noted.

§ 1905.1 Scope and purpose.

This part sets forth the policy and procedures with respect to the production or disclosure of (a) material contained in the files of CIA, (b) information relating to or based upon material contained in the files of CIA, and (c) information acquired by any person while such person was an employee of CIA as part of the performance of that person's official duties or because of that person's association with CIA.

§ 1905.2 Definitions.

For the purpose of this part:

(a) *CIA or Agency* means the Central Intelligence Agency and includes all staff elements of the Director of Central Intelligence.

(b) *Demand* means any subpoena, order, or other legal summons (except garnishment orders) that is issued by a federal, state or local governmental entity of competent jurisdiction with the authority to require a response on a particular matter, or a request for appearance of an individual where a demand could issue.

(c) *Employee* means any officer, any staff, contract, or other employee of CIA; any person including independent contractors associated with or acting on behalf of CIA; and any person formerly having such a relationship with CIA.

(d) *Production or produce* means the disclosure of:

(1) Any material contained in the files of CIA; or

(2) Any information relating to material contained in the files of CIA, including but not limited to summaries of such information or material, or opinions based on such information or material;

(3) Any information acquired by persons while such persons were employees of CIA as part of the performance of their official duties or because of their official status or association with CIA;

in response to a demand upon an employee of CIA.

(e) *General Counsel* includes the Deputy General Counsel of Acting General Counsel.

§ 1905.3 General.

(a) No employee shall produce any materials or information in response to a demand without prior authorization as set forth in this part. This part applies to former employees to the extent consistent with applicable nondisclosure agreements.

(b) This part is intended only to provide procedures for responding to demands for production of documents or information, and is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable by any party against the United States.

§ 1905.4 Procedure for production.

(a) Whenever a demand for production is made upon an employee, the employee shall immediately notify the Litigation Division, Office of General Counsel, Central Intelligence Agency, Washington, DC 20505 (703/874-3118;which shall follow the procedures set forth in this section.

(b) The General Counsel of CIA and Deputy Directors of Heads of Independent Offices with responsibility for the information sought in the demand, or their designees, shall determine whether any information or materials may properly be produced in response to the demand, except that the Office of General Counsel may assert any and all legal defenses and objections to the demand available to CIA prior to the start of any search for information responsive to the demand. CIA may, in its sole discretion, decline to begin any search for information responsive to the demand until a final and non-appealable disposition of any such defenses and objections raised by CIA has been made by the entity or person that issued the demand.

(c) CIA officials shall consider the following factors, among others, in reaching a decision:

(1) Whether production is appropriate in light of any relevant privilege;

(2) Whether production is appropriate under the applicable rules of discovery or the procedures governing the case or matter in which the demand arose; and

(3) Whether any of the following circumstances apply:

(i) Disclosure would violate a statute, including but not limited to the Privacy Act of 1974, as amended, 5 U.S.C. 552a;

(ii) Disclosure would be inconsistent with the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods;

(iii) Disclosure would violate a specific CIA regulation or directive;

(iv) Disclosure would reveal classified information;

(v) Disclosure would improperly reveal trade secrets or proprietary confidential information without the owner's consent; or

(vi) Disclosure would unduly interfere with the orderly conduct of CIA's functions.

(d) If oral or written testimony is sought by a demand in a case or matter in which the CIA is not a party, a reasonably detailed description of the testimony sought, in the form of an affidavit, or if that is not feasible, a written statement, by the party seeking the testimony or by the party's attorney must be furnished to the CIA Office of General Counsel.

(e) The Office of General Counsel shall be responsible for notifying the appropriate employees and other persons of all

decisions regarding responses to demands and providing advice and counsel as to the implementation of such decisions.

(f) If response to a demand is required before a decision is made whether to provide the documents or information sought by the demand, an attorney from the Office of General Counsel, after consultation with the Department of Justice, shall appear before and furnish the court or other competent authority with a copy of this Regulation and state that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate CIA officials, and shall respectfully request the court or other authority to stay the demand pending receipt of the requested instructions.

(g) If the court of other authority declines to stay the demand pending receipt of instructions in response to a request made in accordance with § 1905.4(g), or rules that the demand must be complied with irrespective of instructions rendered in accordance with this part not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall, if so directed by the General Counsel of CIA, or designee, respectfully decline to comply with the demand under the authority of *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and this Regulation.

(h) With respect to any function granted to CIA officials in his part, such officials are authorized to delegate in writing their authority in any case or matter or category thereof to subordinate officials

(i) Any nonemployee who receives a demand for the production or disclosure of CIA information acquired because of that person's association or contacts with CIA should notify CIA's

Office of General Counsel, Litigation Division (703/874-3118) for guidance and assistance. In such cases the provisions of this regulation shall be applicable.

APPENDIX W

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - x

COMMONWEALTH OF VIRGINIA :

-vs- : CRIMINAL

: DOCKET NO. 79148

MIRA AIMAL KASI :

Defendant. :

- - - - - - - - - - x

Circuit Courtroom No. 5-G

Fairfax County Judicial Center

Fairfax, Virginia

Thursday, November 6, 1997

The above-entitled matter came on to be heard, with a Jury, before the HONORABLE J. HOWE BROWN, JR., Judge, in and for the Circuit Court of Fairfax County, in the Courthouse, 4110 Chain Bridge Road, Fairfax, Virginia, beginning at 10:04 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

ROBERT F. HORAN, JR.

COMMONWEALTH'S ATTORNEY

On Behalf of the Defendant:

RICHARD GOEMANN, ESQUIRE

FRANK ROMANO, ESQUIRE

CRYSTAL A. MELEEN, ATTORNEY-AT-LAW

JUDITH BARGER, ATTORNEY-AT-LAW

CONTENTS

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
WILLIAM WHILDON	21	44	64	65
AGENT CHALKLEY	68	70	--	--
DR. FRANCES FIELD	72	79	97	--
AGENT DORSEY	99	--	--	--
STEVEN BITTLE	115	121	--	--
MARGERITE WARNER	125	149	--	--
THOMAS MARTIN	164	175	181	--
CLAUDE SERWIT	186	188	202	--
BRADLEY J. GARRETT	203	230	265	--

EXHIBITS

	FOR IDENTIFICATION	IN EVIDENCE
COMMONWEALTH'S EXHIBIT 31	24	28
COMMONWEALTH'S EXHIBIT 9	33	--
COMMONWEALTH'S EXHIBIT 35	--	38
COMMONWEALTH'S EXHIBIT 36	40	42
COMMONWEALTH'S EXHIBIT 37	42	44
COMMONWEALTH'S EXHIBIT 29	102	--
COMMONWEALTH'S EXHIBIT 30	103	--
COMMONWEALTH'S EXHIBIT 38,39	--	114

EXHIBITS CONT'D.

	FOR IDENTIFICATION	IN EVIDENCE
COMMONWEALTH'S EXHIBIT 40	--	119
COMMONWEALTH'S EXHIBIT 41	--	119
COMMONWEALTH'S EXHIBIT 29	--	162
COMMONWEALTH'S EXHIBIT 30	--	162
COMMONWEALTH'S EXHIBIT 42	--	175
COMMONWEALTH'S EXHIBIT 43	205	207
COMMONWEALTH'S EXHIBIT 44	226	227
DEFENSE EXHIBIT D	56	58
DEFENSE EXHIBIT E	88	88
DEFENSE EXHIBITS F,G,H,I	230	239

202

THE COURT: Next?

MR. HORAN: Special Agent Garrett.

Whereupon,

BRADLEY J. GARRETT

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q State your full name, please, and your occupation.

A It's Bradley J. Garrett, G-A-R-R-E-T-T. I'm a special agent with the FBI.

Q How long have you been an agent with the FBI?

A Approximately 13 years.

Q What are your duties with the bureau?

A Primarily violent crime matters, homicides, kidnappings, assaults.

Q Directing your attention to January 25th of 1993, did you become involved in the investigation into the killings at the CIA on that day?

A I did.

Q And when and where did you first become involved?

A Approximately ten minutes after the event occurred, a little after 8:00 o'clock in the morning.

Q Did you go to the scene on that day?

A I did.

Q Do you know the Defendant, Mir Aimal Kasi?

A I do.

Q Did you see him on June 17th of 1997?

A I did.

Q Did you discuss the CIA killings with him on that day?

A I did.

Q Where did this discussion take place?

A Aboard an aircraft en route to the United States.

Q And had you ever discussed this matter with him prior to the discussion on the airplane on that day?

A No.

Q Had you ever tried to discuss this matter with him prior to that day?

A No.

Q Now, prior to the discussion on June 17th, did you advise him of any constitutional rights?

A I did.

Q Would you describe for His Honor and the jury the procedure that you followed?

A Yes, sir. There's an FBI form called an FD-395, which is an interrogation advice of rights form, that describes in detail a person's rights.

I read the form to Mr. Kansi, asked him if he

understood the form., he said he did. Then I had him look at the form, and he said that he wanted to talk to me, that he would waive his rights, that he did not want an attorney, and that he would talk to me at this time.

MR. HORAN: I'd ask that this be marked as Commonwealth's Exhibit 43.

(The document referred to above was marked Commonwealth's Exhibit Number 43, for identification.)

MR. HORAN: I want to show you this document that's marked Commonwealth's Exhibit Number 43 for identification and ask can you identify it.

(Whereupon, Mr. Horan handed a document to the Witness for his examination.)

THE WITNESS: Yes. This is the FD-395 form that I used.

BY MR. HORAN:

Q And are there any signatures on that form?

A There's three signatures. There is Mr. Kansi, who signed his name Aimal Kasi; there's my name; and Special Agent Shawn Joyce of the FBI.

Q Now, prior to the execution of that form, did you make any attempt to determine his knowledge of the English language?

A Yes, sir, I did.

Q And what was that?

A We talked approximately forty-five minutes about him coming to the United States, the timeframes that he came here, what he did in the United States, and talked briefly about what he did after he returned to Pakistan in '93.

Q Did he give you any indication of what kind of schooling he had?

A He told me he had a Masters in English.

Q Did he appear to have any difficulty communicating with you on that day?

A No, sir.

Q Did you have any trouble understanding him when he talked to you?

A No, sir.

Q Did there come any time in the portion of the explanation of the rights where he indicated a lack of knowledge of any of the words you were using?

A No.

MR. HORAN: Your Honor, I would offer this into evidence as Commonwealth's Exhibit Number 43.

THE COURT: Any objection to forty-three?

MR. GOEMANN: No, Your Honor.

THE COURT: It's received. Did you want it back?

(The document heretofore marked Commonwealth's Exhibit number 43, for identification, was received into evidence.)

MR. HORAN: Yes, sir. Thank you, Your Honor.

BY MR. HORAN:

Q Would you tell us what rights you advised him of?

A The form, interrogation advice of rights, is your rights. Maybe if I just read the form. "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and

to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

"Waiver of Rights. I have read this statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Q Now, when you were giving him those rights, were you reading that form to him?

A That's correct.

Q And did you give him an opportunity to examine the form before he signed it?

A I did.

Q And did he appear to read the form?

A Yes.

Q Now, prior to the signing of that form, did you

promise him any leniency or any form of reward for giving you a statement?

A Absolutely not.

Q Did you threaten him In any way?

A No.

Q Did you give any Indication at all that if he didn't give you a statement something bad would happen to him?

A None.

Q Once he executed the waiver on that form, did he in fact discuss the CIA killings with you?

A He did.

Q Before I get to what he told you at that time, do you know who arrested this Defendant?

A He was taken into custody by myself and three other FBI agents.

Q And how was that arrest made?

A It was made in a hotel room in a foreign country.

Q And would you just describe the arrest that you actually made?

A We had previously received some information about what he might do. We went to this particular

location. We went to his room. There was a knock at the door. He opened the door. We quickly entered his room and arrested him at that point.

Q And would you describe what took place then?

A When we came in the room, Mr. Kansi started screaming and we had to wrestle with him a while around the room before we could finally get handcuffs on him.

Eventually, we had to actually gag him because he wouldn't quit screaming, two to three minutes after we were in the room perhaps.

Q How many people were involved all together in this incident?

A Four -- four FBI agents.

Q They were all Americans?

A Yes, sir.

Q What kind of hotel room were you dealing with?

A It was a small hotel room, one room and a bathroom.

Q Did you have any conversation with him in the course of this arrest procedure?

A Well, we kept asking him to quit screaming, and eventually he did quit screaming, and I asked him what's your name.

Q What did he say?

A And he said, Fuck you.

Q What happened then?

A I had made the decision that I wanted to make sure that it absolutely was him. So I took a left thumb print.

I had an ink pad and I actually put ink on his left thumb and put it on a piece of paper and looked at his print and compared the prints I had with me -- of know prints of him -- and determined it was in fact him.

MR. ROMANO: Your Honor, I'm going to object. This witness has not been qualified as one of the previous witnesses was qualified as to his ability to compare prints.

That conclusion, that it's suppose to be for the purposes of fact is objectionable.

MR. HORAN: Your Honor, that goes to its weight rather than its admissibility.

THE COURT: I overrule the objection. He's simply testifying to what he did, the effect of it. You can argue or cross examine with regard to it.

BY MR. HORAN:

Q Now, where was he taken after the arrest?

A He was taken out of this hotel, placed in a vehicle, transported to a plane, and then flown to another location.

Q Was he in any restraints at that time?

A He was.

Q What kind of restraints were they?

A Handcuffs, ankle cuffs, and a covering over his face.

Q You then took a plane ride. How long did that plane ride take?

A Approximately an hour.

Q And once that plane landed, where did you go?

A We sat on the ground about an hour and a half. And then after about an hour and a half we went to a holding facility, where he was kept for a couple of days.

Q Now, during the period of time that he was in that holding facility, did you have any discussions at all with him about this case?

A Only about his well-being.

Q And while he was in this holding facility, did you or any of the other FBI agents have the ability to observe him during that period of time?

A Continually.

Q You did that in shifts?

A We did.

Q And what was the purpose of keeping him constantly under surveillance during that time?

A Two-fold. One, that nobody talked to him; and secondly, that he was humanely treated.

Q Did you do any examinations of him to see whether or not he was all right?

A We did.

Q And what would they have been?

A Myself and another agent are emergency medical technicians and we took his pulse. We asked him how he felt.

He got scraped up a little bit during the arrest on his back and on his elbow. We had to raise his shirt up, asked him how he felt, if he wanted any medication. He said he felt fine and there weren't any problems.

Q And what was the date that you actually took him into custody?

A June the 15th.

Q And approximately what time of day on June the 15th?

A A little after 4:00 a.m.

Q And approximately what time did you get him to this detention facility?

A 8:30 a.m., the same day.

Q And once you had him in the detention facility, was he allowed to eat?

A He was, yes.

Q And was that done the entire time he was in the facility?

A Yes.

Q Did he sleep while he was in that facility?

A He did.

Q Did anyone harass him or bother him while he was in that facility?

A No.

MR. ROMANO: Your Honor, I'm going to object. The agent testified that they did this in shifts. He can really only testify to whatever shifts he was doing the observation.

THE COURT: From his observation.

BY MR. HORAN:

Q From your observation. Did you receive any reports from any of your compatriots over there of any

mistreatment of this Defendant?

A No. I specifically asked them to tell me anything that went on. We had a discussion in fact on the way back and they said no one approached him.

Q Eventually, were you allowed to take him out of that detention facility?

A After two days.

Q How did that come about?

A I received information from the U.S. official at the U.S. Embassy in Pakistan that he was going to be released and that we could take him back on the morning of June 17th.

Q And how long did it take you to get to the airport you took him to?

A Approximately thirty minutes.

Q What was his form of restraint from the time you took him out of the detention facility to the time he got onto the airplane?

A He was placed in handcuffs, ankle cuffs, and a cover was placed over his face.

Q Were you in favor of putting a covering over his face?

MR. ROMANO: Objection, Your Honor. It's

speculation. It's a conclusion. It's just not --

THE COURT: I sustain the objection to whether he was in favor or not. That's not relevant to the issues.

BY MR. HORAN:

Q Are you the one who asked that he have a covering over his head?

A No.

Q Once you got on the airplane, would you describe how the airplane was set up?

A The airplane was set up in a manner that as you walk into the back of the airplane, there was actually a compartment slid into the plane, no windows.

In that compartment were twelve seats, airline seats, and myself and six FBI agents were the only people in that component inside the plane the entire plane trip.

Q And where did you put him on the plane?

A He was obviously in there with us. He was in the back set of seats. You had two seats facing two seats, three sets of those.

Q At the time you advised him of his constitutional rights, where was he seated with relation to you?

A Directly across. He was facing the back of the

plane. I was facing the front of the plane, face to face.

Q And were there any other agents there during the advice of rights?

A One other agent.

Q And who was that?

A Special Agent Shawn Joyce.

Q Did he also sign that form?

A He did.

Q Now, at the time you were taking the statement from him, would you describe his physical condition at that time?

A Good.

Q Had he been sleeping and eating during the two days that you had observed him?

A That, plus he had eaten on the plane.

Q How long after you got on the plane did you begin talking to him?

A Approximately an hour, an hour and a half, after we took off.

Q Now, let me ask you this, Agent Garrett. Had you been to Southern Asia from the time of the event in January of 1993 until June 15th of 1997?

MR. GOEMANN: Your Honor, I'm going to object

on relevance grounds.

THE COURT: What's the relevance of where he's been?

MR. HORAN: Your Honor, he was searching for him all those years.

THE COURT: I don't find that to be relevant to the issues at this point. I mean you can come up and tell me if you think it is and I'm missing something.

BY MR. HORAN:

Q He began to discuss the incident with you?

A He did.

Q And will you tell us what he told you?

A He stated that in January or February of 1991 or 1992, he traveled to the United States, and after arriving in the United States, he told me he worked at two different places, one being Ace Moving Company, the other being Excel Courier Company. He said he remained in the United States until January of 1993. Then he went back to Pakistan.

He stated that he originally came to the United States and was going to stay here, but decided that he worked too hard here, and it just wasn't a place for him and that he wanted to go back home, and that he had decided

a short time before the shooting that he was actually going to do this particular shooting that he's been charged with.

Q Did he give you any reasons why he wanted to do this shooting?

A He gave me three reasons. He said that he had watched on CNN U.S. planes attacking parts of Iraq and this upset him because they are Muslim.

Also, he was upset with the CIA because of their involvement in Muslim countries and affecting the power control inside Muslim countries. That was the second reason.

The third was the treatment -- and I think he used the word, "killing of Pakistanians by U.S. components", and that he just decided that he needed to convey a message to the U.S. so that they would stop doing these kind of acts.

Q Did he tell you where he got the weapon he used?

A He said he bought the weapon at a gun shop in Chantilly, Virginia.

Q Did he tell you when that was?

A Approximately two weeks before the shooting he bought an M-16 and two pistols. And then, his words, two

or three days before the shooting he exchanged the M-16 for an AK-47.

Q Did you have any discussion of Israelis in the course of this whole thing?

A He stated that when he decided to do the shooting, it was going to be either the CIA or the Israeli Embassy in Washington.

He decided the CIA because he thought it would be easier and safer and he also thought that the CIA employees would not be armed.

Q What did he tell you about the actual shooting incident itself?

A That on the morning of January 25th, he left his home in Herndon, Virginia, to go to Route 123, outside the CIA.

He stated that he had been up and down 123 several times as a result of his courier service delivery.

He was familiar with the area, was familiar with the two left turn lanes that you get into to turn into the road that takes you back to the CIA front gate. He was aware that that's where those two lanes went.

Then on the morning of January 25th, he drove

his vehicle and parked in the right of the two left-hand turn lanes, got out of his vehicle and shot into, his words, five or six vehicles, shooting five or six individuals, and shooting ten to fifteen rounds.

Q Did you ask him why he stopped shooting?

A He said there wasn't anybody else left to shoot.

Q Did you ask him what gender the people were that he shot?

A He said that he only shot males because it would be against his religion to shoot females.

Q Did he tell you what he did after the shooting?

A He did. He drove away from the scene and his car was pointed in the direction toward the George Washington Parkway.

Approximately a quarter to a half mile from the shooting scene going towards the parkway was an Exxon gas station. He said he turned right -- he drove down to that gas station and he turned right, went a short distance, parked his car.

He also stated that he used his own vehicle to do this, an Isuzu pickup truck -- parked his Isuzu pickup, walked into this park -- which would now put him maybe a

mile from the crime scene -- and sat in the park for about an hour and a half.

Q Then what did he do?

A He said he was just sitting there. About 90 minutes and thought it was probably safe because nobody approached him.

So at that point he gets back in his vehicle, uses back streets to go to the Tyson's Corner area, then gets on the Dulles Toll Road and comes back to his home on Glade Drive, Laural Glade Apartments.

Q Where is that located?

A That's in Herndon, off the Reston Parkway.

Q Now, did he tell you what he did when he got back to the apartment?

A He went back to the apartment and he said he took the AK-47 that he used in the shooting, he put it in a green plastic trash bag and he slid it under the couch in the living of the apartment that he was staying in.

He recalled the apartment number as being 2 in the Laurel Glade Apartments. He changed clothes and took off the khaki-colored clothing that he had on. He went in the closet and he put on blue jeans.

He also turned the television on and stated

that he heard the Fairfax County Police Chief say that they didn't have a tag number of the vehicle used in the shooting.

At that point he felt he was fairly safe as far as the identity of his vehicle or him. He left the apartment, said he went and had some lunch. I recall he said he may have went to a McDonald's and had some lunch.

He then went to a market, a Pakistani market in Herndon and had decided once he got back to the apartment that he was going to go back to Pakistan.

So he goes to the market and he buys a one-way ticket back to Pakistan. The gentleman who sold him his tickets said -- according to Mr. Kansi -- that it would take a day and that he could pick the ticket up on the afternoon of the 26th of January.

So he leaves the market. He goes to the Days Inn Motel at Eldon and the toll road in Herndon, Virginia. Spends the night there.

Then he drives back to his apartment, parks his Isuzu pickup truck, and walks to the market. He's at the market for a few hours, asked the owner to give him a ride to National Airport to start his flight, and the owner says I'll take you.

He stated then he went National Airport. He flew from National Airport to JFK in New York, then got aboard a Pakistani international air flight. Flew to Switzerland, another city he couldn't recall, and then eventually to Karachi, Pakistan.

Q Did he tell you where he went from Karachi?

A He said he boarded a bus. He stayed in Karachi six or eight hours. He stayed in a hotel-type setting for six or eight hours, then got on a bus and went to Quada, Pakistan, his home town.

Q Did he remain there?

A He stayed there about two or three days. And he told me that once he got there he was concerned that he had put the rifle, the AK-47, under the couch, because he thought the police will probably find it and they'll figure out who did this shooting.

So at that point -- he had not told his family why he came back to Pakistan, but after two or three days, he left Quada, Pakistan, and he told me he went in, and basically for the next four and a half years traveled at various localities inside Afghanistan.

Q Did he tell you what any of those localities were?

A He mentioned three, Kaldimara, Kabul, which is the capital of Afghanistan, and another city over on the Pak-Afghan border, called Jhalalabard.

Q Did he tell you who he stayed with during that period of time?

A He said various individuals along the way that he was friends and associates with.

Q Did you have any discussions with him as to why he used the AK-47?

A Yes. He said the reason he used it is because it would be more accurate.

Q More accurate than what?

A Than a pistol, because he had purchased two pistols at the time he had purchased the M-16.

Q Did you have any discussion about the magazines that he got?

A He said he had approximately a hundred and fifty rounds on him when he did the shooting outside the CIA, and that the reason that he had the extra magazines was for fear or concern that law enforcement might show up at the scene and he would have to have extra ammunition to deal with them.

Q Did you ask him whether or not he knew the

people he was shooting?

A No. He said that he did not know the people that he was shooting, that he believed that they were CIA employees because they were in those two left-hand turn lanes to enter back into the CIA, but he didn't know who they were specifically.

MR. HORAN: I wonder could this be marked as Commonwealth's Exhibit Number 44 for identification?

The document referred to above was marked Commonwealth's Exhibit Number 44, for identification.)

MR. HORAN: Agent Garrett, I want to show you this document that's marked Commonwealth's Exhibit Number 44 for identification and ask can you identify it.

(Whereupon, Mr. Horan handed a document to the Witness for his examination.)

THE WITNESS: I can.

BY MR. HORAN:

Q And what is that document?

A This is a document that I prepared on June 17th, 1997.

At the conclusion of interviewing Mr. Kansi, I asked him if he would be willing to sign a statement and that I would write the statement out, I would read it to him. If it was true and accurate, would he be willing to sign it, and he said he would, and that's what this statement is.

MR. HORAN: Your Honor, I would offer this in evidence as Commonwealth's Exhibit Number 44.

THE COURT: Any objection to 44?

MR. GOEMANN: No, sir.

THE COURT: Forty-four is received.

(The document heretofore marked Commonwealth's Exhibit Number 44, for identification, was received into evidence.)

BY MR. HORAN:

Q Agent Garrett, I wonder would you read Commonwealth's Exhibit Number 44 for the jury?

A Yes, sir. It's dated at the top, 6-17-97. Excuse me. I have a cold. That's why I keep stopping.

"I, Aimal Mir Kasi, also known as Mir Aimal Kasi, freely and voluntarily provide this statement to SA Bradley J. Garrett and SA Shawn Joyce of the FBI. No threats or promises have been made to me. I can read and write and have a Masters degree in English.

Approximately two to three days prior to the shooting outside CIA headquarters in January of 1993, I purchased an AK-47 rifle and approximately a hundred and fifty rounds of AK-47 ammo. I also purchased two pistols at this time.

On Monday, 1/25/93, I drove my Isuzu pickup truck to the entrance road off of Highway 123 in Fairfax County, Virginia.

I had with me the purchased AK-47 and several magazines of ammo. I parked my truck in the right lane of the two left lanes that turn into CIA headquarters. I got out of my vehicle and started shooting into vehicles stopped at a red light. I shot approximately ten rounds, shooting five people. I aimed for the chest area of the people I shot.

I then returned to my truck, drove back to my apartment in Herndon, Virginia, after stopping at a park approximately one mile from the shooting. The next day I

returned to Pakistan. This statement is accurate and correct."

And then the last paragraph, "Also several days before the shooting, I decided to do the shooting at the CIA or the Israeli Embassy, but decided to shoot at the CIA because it was easier, because CIA officials are not armed. Signed Aimal Kasi, 6/17/97. Witness, SA Bradley J. Garrett, FBI, 6/17/97; SA Shawn M. Joyce, FBI, 6/17/97."

MR. HORAN: I have no further questions, Your Honor.

THE COURT: Cross examination?

MR. ROMANO: Your Honor, does Your Honor have a feeling as to how late you want to go today, because I'm not going to be finished with Special Agent Garrett by 5:00 o'clock or 5:30.

THE COURT: Well, we'll see how it goes.

MR. ROMANO: Your Honor, may I approach the Clerk?

THE COURT: Yes.

MR. ROMANO: May I have this marked for identification as Defendant's Exhibits F, G, H and I, four photographs?

(The documents referred to above were marked Defendant's Exhibit Numbers F, G, H, and I, for identification.)

CROSS EXAMINATION

BY MR. ROMANO:

Q Special Agent Garrett, you said that the conversation that you had with Mr. Kasi on the aircraft coming from wherever he started, in whatever foreign country you brought him from, to the United States, started about an hour to an hour and a half after you got on the plane?

A Approximately.

Q And before then, you were having a conversation with him concerning what he did in the United States before January 25th, 1993, and what happened afterwards?

A That was a continuous conversation. That all started about an hour or an hour and a half after we took off.

Q And did your reading of the rights precede or follow that background information that you were getting from him?

A Followed.

Q The conversation that you had -- Well, let me ask you this.

The flight that you took from this foreign country, which was Pakistan, right?

A That is correct.

Q Did you fly non-stop to Dulles?

A We did.

Q And that was approximately 20 to 21 hours?

A Correct.

Q And you were on the plane, you and six -- was it you and six other FBI agents or you and five other FBI agents?

A Six, total.

Q You and five other FBI agents and Mr. Kasi?

A Correct.

Q And you seven people were the only people in this compartment that was inserted into this aircraft that you were flying on?

A That's correct.

Q The conversation that you had with him that Exhibit L and Exhibit 44 memorializes took approximately how much of that 21 hours?

A Are you referring to this signed statement? What document are you referring to?

Q I'm talking about the conversation that you had with him started about an hour and a half after you left Pakistan.

A Right.

Q And finished how long after that?

A The background conversation took about 45 minutes. The conversation about the shooting took a little over an hour, maybe up to an hour and a half.

Q An hour to an hour and a half?

A Correct.

Q And at the end of that conversation is when you asked him if it would be okay if you would write something down and he would read it and sign it?

A Correct.

Q And what you have written down, which is Commonwealth's Exhibit 44, is a distillation of what he said? It's not everything he said, right?

A Correct.

Q When you arrested Mr. Kasi in Pakistan, you and three other FBI agents?

A Correct.

Q All of you were armed?
A Yes.
Q All of you with handguns, and I believe you said previously one with a shoulder gun?
A Correct.
Q And this was in the middle -- the wee hours of the morning in Pakistan?
A Approximately 4:00 a.m.
Q And you had information that Mr. Kasi was alone in a hotel room?
A That's correct.
Q And he was?
A He was.
Q When you went there, that's right where he was?
A Exactly.
Q And you knocked on the door and when he answered it, you all went in?
A We did.
Q And you were all armed?
A We were.
Q And you took him down?
A We did.
Q Now, I was a bit confused about -- you said he

started to scream, and you kept asking him to stop, and he wouldn't?

A Correct.

Q So eventually you gagged him?

A We did.

Q And he still didn't stop screaming. Eventually, he stopped screaming after you gagged him?

A That's not true. He continued to scream even after he was gagged.

Q Yeah, I think that's what I said. Even after you gagged him, he continued to scream?

A Yes.

Q But at some point he stopped for a while?

A That's correct.

Q But you also said you asked him his name. Did you do that before or after you gagged him?

A What happened was, after he was gagged he was able to move the gag a little bit. So it really wasn't restricting him from talking.

Q Well, he was cuffed, wasn't he?

A He was cuffed, but his mouth wasn't cuffed. So he could still --

Q He moved the gag with his mouth?

A Yes. He was able to talk around the gag.

Q So after you gagged him and after he eventually stopped screaming, while he had the gag over his mouth, you asked him his name?

A I did.

Q And you put the gag in his mouth so you wouldn't hear him screaming?

A That's correct.

Q And a gag, would it be fair to say, is not something that's conducive to having you speak through it; is that not correct?

A True.

Q And when you asked him his name, while he was gagged, he said fuck you?

A He did.

Q And have you arrested a lot of people in your career?

A Yes.

Q Is this fairly typical of the people that you arrest? They are not very happy to be arrested?

A Typically, they are not happy to be arrested.

Q And this case was no different?

A This case was no different.

Q Now, were you also -- you were with Mr. Kasi when he arrived in the United States; is that right?

A I was.

Q Were you also with Mr. Kasi at the time that he was transported from Dulles Airport to the Fairfax County Adult Detention Center?

A I was.

MR. ROMANO: Your Honor, may I approach The witness?

THE COURT: Yes. Show Mr. Horan what you have so he knows what you're showing.

(Whereupon, Mr. Romano handed some documents to Mr. Horan and then the witness for examination.)

BY MR. ROMANO:

Q Special Agent Garrett, do you recognize what those photographs depict?

A Yes, sir.

Q Can you tell us what they do? Well, let me ask you this. When you arrived with Mr. Kasi at the Adult Detention Center, were you aware of how he looked?

A I was with him.

Q Would you take a look at those photographs and see if they reflect anything accurate or not accurate about

the way he looked when he arrived at the Adult Detention Center on the 17th of June?

A The only thing that's not accurate is this white dot on his nose. That wasn't on it when I arrived.

Q So if that happened, it was when he was in the facility? Did you come into the facility with him?

A I did.

Q And that white dot wasn't there? Do you know what that is?

A No.

Q Does it appear to be some kind of a bandage?

A It appears to be a bandage.

Q Other than that white dot which you have no explanation for, are those four photographs -- do they accurately depict how Mr. Kasi looked on the 17th When you got him to the Adult Detention Center?

A It does.

Q And that was about what time? It was in the evening, right? It was dark?

A These photographs would have been taken probably 8:30 to 9:00 p.m., at night.

Q And this was on the 17th?

A Correct.

Q And when you went into the hotel room, it was the 15th, at 4:00 o'clock Pakistani time, in the morning?

A Correct.

Q Which is the time when the injuries that were reflected in those photographs were inflicted on Mr. Kasi, right?

A Correct.

Q So they've had whatever the time between 4:00 o'clock a.m. on the 15th of June to 8:30 or 9:00 p.m. on the 17th of June, given the difference in Pakistani time, which is about nine hours, right?

A Correct.

Q To heal?

A Correct.

MR. ROMANO: Your Honor, I would move those into evidence.

THE COURT: Any objection?

MR. HORAN: I'll object to the one with the dot, whichever one that may be, because he testified that doesn't accurately reflect what he saw in that one.

THE COURT: May I see the pictures?

MR. ROMANO: Yes, sir.

(Whereupon, Mr. Romano handed the photographs to His Honor for his examination.)

THE COURT: I overrule the objection. I think the jury can take his testimony into account in viewing that picture.

Let me see counsel up here just a second.

BENCH CONFERENCE

THE COURT: When the Clerk marked these, He marked them showing the hearing date. We don't usually do that. Did you ask him to do that?

MR. ROMANO: No, sir. They had already Been marked from that hearing, he just didn't take the stickers off.

THE COURT: I know. Do you want them marked? The problem is you've got to have the other pages.

MR. ROMANO: I know. Leave them marked.

THE COURT: That's why I asked.

(The documents heretofore marked Defendant's Exhibit Numbers F, G, H, and I, for identification, were received into

evidence.)

OPEN COURT

BY MR. ROMANO:

Q Now, I know you previously stated that this was a small room and Mr. Kasi was in it alone; is that right?

A That's correct.

Q How long were you in the room before you put him in the vehicle to take him to the first plane?

A Ten to fifteen minutes.

Q And for most of that time -- for all of that time, after you took him down, he was handcuffed?

A He's handcuffed.

Q With his hands cuffed behind him?

A Correct.

Q And when did you put the leg cuffs, the ankle cuffs, on him?

A They were put on before he was taken out of The room.

Q So he was taken out of the room. He was handcuffed and ankle cuffed and gagged?

A No, that's not accurate. He was not gagged.

Q You took the gag off?

A Correct.

Q And was that before or after you put the hood

over his head?

A I don't recall.

Q When he left the room, he had the hood on, and ankle cuffs, and handcuffs?

A That's correct.

Q And you and the other three FBI agents escorted him to the plane?

A That's correct.

Q And at this point now, after you've arrested him and were going to take him to the plane, there were other people present on the scene?

A There are.

Q And those people were also armed?

A They were.

Q When you went on the plane, did all four of the FBI agents accompany Mr. Kasi to the first plane you took him?

A No. Myself and one other agent.

Q Yourself and one other agent were in the vehicle that took him to the plane or were you all four there and two of you were dropped off?

A In the vehicle that went from the hotel to the plane was myself and Special Agent Joyce, Mr. Kasi, and

some other individuals.

That vehicle then goes to the airport. We get out of the vehicle, and then another FBI agent goes with me on the plane to the next location.

Q So Special Agent Joyce then did not get on the plane?

A Not on that plane.

Q Now, the other individuals -- you said it was you and Special Agent Joyce, Mr. Kasi, and some other individuals. These were the other armed individuals you were talking about earlier?

A Correct.

Q And this was how long a ride to the plane?

A From the hotel? Is that your question?

Q Yes.

A Thirty, forty-five minutes, approximately.

Q And during this time, you were not having any discussion with Mr. Kasi?

A Correct.

Q And nor is Special Agent Joyce?

A Correct.

Q And then is it safe to assume that the other people weren't talking to him either?

A They were not, because he was sitting next to me, so I know.

Q And he was fully handcuffed?

A Correct.

Q Then when you got on the plane, Special Agent Joyce dropped away and another agent joined you?

A That's correct.

Q And were these other armed individuals also with you on the plane?

A Some of them.

Q So there are enough of them so that even though some were left behind, it was not one; there was still some left?

A Correct.

Q And Mr. Kasi was still in handcuffs, ankle cuffs, and a hood was placed over his head -- was still over his head?

A That's correct.

Q And at some point I believe you moved the hood up a little bit so he could breathe?

A Shortly after getting aboard the plane.

Q But you never took it off?

A It was not taken off.

Q And that plane trip was about an hour and a half?

A A little over an hour, between an hour and an hour and a half.

Q And then when you landed, you were another hour and a half on ground?

A Sitting on the plane.

Q Right; and still cuffed, cuffed and hooded?

A Correct.

Q Mr. Kasi, that is?

A With the hood rolled up.

Q Right. And during the entirety of the plane trip, no conversation between you and Mr. Kasi or anyone else and Mr. Kasi?

A Correct.

Q And while you were on the ground for the hour and a half, no conversation?

A Correct.

Q At any point -- maybe that's an in-artful question. Conversation implies back and forth.

Were you talking to him and he wasn't responding?

A I wasn't talking to him at all.

Q Was he talking to you?
A No.
Q Was he talking to anybody else?
A No.
Q So approximately three and a half to four hours after you took him down and took him to the plane was when you took him off the plane to take him to the detention center?
A Approximately.
Q And you took him to the detention facility -- you and the other special agent that was with you took him to the detention facility?
A Special Agent Joyce went with him initially, rode in the back seat with him to the detention facility.
Q Well, Special Agent Joyce wasn't on the plane.
A He came on another plane.
Q On another plane that took off and landed together?
A Shortly. One followed the other.
Q And then you and Special Agent Joyce -- or Special Agent Joyce accompanied him to the detention facility; you did not?
A Right, that's correct.

Q Was Special Agent Joyce alone with him?
A There were other individuals in the vehicle with Special Agent Joyce and Mr. Kasi.
Q Were they the same or different individuals that were on the plane?
A Different.
Q They were armed, too?
A I don't know. I didn't see weapons. I don't know.
Q You were never unarmed during the course of this?
A Correct.
Q Nor were any of the other FBI agents?
A Correct.
Q Now, I believe you called it the holding facility; is that right?
A I did; that's correct.
Q Or the detention facility. Is either or both of those accurate?
A They are both accurate.
Q And this was not another hotel?
A This was not another hotel.
Q This was a facility that was meant to keep

people after they were incarcerated?

A Temporarily, yes.

Q He was in a cell?

A He was in a cell.

Q Three walls, no windows, and bars on one side?

A Correct.

Q You said that you got him there about 8:30 in the morning?

A Approximately, yes.

Q And he was there at that facility -- now, this is later in the morning of the 15th of June?

A Correct.

Q And sometime in the morning of the 17th of June is when you got clearance to take him out of the country?

A Monday night, the 16th.

Q So Tuesday morning, the 17th, is when you actually took him out of there?

A Correct.

Q And he was in this facility for the entirety of that time?

A He was.

Q And he was in this facility by himself, this cell by himself?

A He was in the cell by himself, yes.
Q And you or the other FBI agents was surveying him the entirety of the time he was there?
A Correct.
Q As I believe were also whoever was running the facility, because it was not run by the United States; is that right?
A Correct.
Q So he was never alone, insofar as there was somebody else always where they could see him?
A That's correct.
Q And he was cuffed still?
A In the front.
Q How about ankle cuffs?
A No.
Q The hood was gone or was it still there?
A The hood was gone.
Q When did the hood come off?
A Once he arrived -- according to Special Agent Joyce, once he arrived at the detention facility.
Q So after the plane landed and he was taken to the detention facility with Special Agent Joyce, he still had the hood on?

A Correct.
Q And he had it taken off then when he got to the facility?
A Correct.
Q Mr. Horan asked you what was the purpose of you observing him continually in shifts and you said it was twofold, to make sure that nobody talked to him?
A Correct.
Q And to make sure that he was humanely treated. And then you said that you would make sure that no one approached him and no one did approach him for two days?
A That's correct.
Q And at no point during the time, during this two days, did you attempt to interview him like you did on the plane coming to the United States?
A That's correct.
Q And at any time, do you know if he mentioned any interest in talking to you?
A Not that I know of. He never mentioned anything to me.
Q So in essence, he just stayed there for two days, by himself, in a cell. Nobody approached him and nobody talked to him?

A Well, other than the conversations about his health.

Q You'd go in and take his pulse.

A Asked him how he felt and check him.

Q And make sure his wounds weren't infected?

A Correct.

Q Now, in the first time that you had any conversation other than that which you have already described, to take his pulse, to make sure his wounds aren't infected, and to keep people away from him, was on the plane, coming from Pakistan to the United States?

A Other than asking his name in the detention facility. I did do that.

Q Did you get a similar response to the one you got before?

A No. He gave me his name.

Q And did you just walk in and ask him his name, or did you preface this with, well, we know who you are; you might as well tell us?

A No. I just asked him his name.

Q At any time between the time that you arrested him in the hotel room and the time that you took him out of the detention facility on the 17th, two days later, did you

tell him you were FBI agents?

A Yes.

Q When?

A In the back of the vehicle, going to the first plane.

Q Did that get any response from him?

A Unh-huh.

Q Did you give him any other explanation or did you just say Brad Garrett, FBI?

A We said we were with the FBI, and he said you're going to take me back to the United States; and I said yes.

Q So previously, when you said that there wasn't any conversation on the ride, that was not accurate?

A Other than telling him who I was, and he responded, yes.

Q Was there anything else? That's it? That's the entirety of the conversation?

A Correct.

Q The facility that he was held in for two days was windowless, I believe you said?

A Correct.

Q And the entirety of this facility was made up

of cells; one of which Mr. Kasi occupied?

A Correct.

Q This was the middle of June in Pakistan, right?

A It was.

Q What was the temperature there?

A Warm.

Q Warm or hot?

A It was in the eighties inside the cell area.

Q Now, during the flight to the United States, was he handcuffed?

A Yes.

Q And, in fact, from the time that you arrested him in the hotel room to the time you delivered him here, he was never not handcuffed?

A Correct.

Q And at some point on the plane ride, you decided that this was the time that you were going to talk to Mr. Kasi about what you had arrested him for?

A That's correct.

Q How did that conversation begin? Did you start asking him questions? How did it begin?

A It began by myself and Special Agent Joyce introducing myself again to him, and asking him if he would

be willing to talk to us about his life and what occurred when he lived in the United States.

Q But the first part of this conversation was preparatory. It had nothing to do with what you had arrested him for. It was what were you doing in the United States; why did you come to the United States; what did you do since you left; right?

A That's correct.

Q And then the course of the interview, I believe you said it was about an hour to an hour and a half?

A After the forty-five minutes?

Q Right. Yes, the part that's reflected in Commonwealth's Exhibit Number 44, the part that you instilled into that exhibit?

A Correct.

Q The Exhibit 43 I believe was the waiver of rights form. It says interrogation and advice of rights. Now, is that what happened on the plane? You interrogated him, right?

A I interviewed him.

Q Well, this doesn't say interview and advice of rights, does it?

A The form says interrogation.

Q But you're saying that it wasn't an interrogation. It was just an interview?

A It was an interview.

Q Did the interview take the form of question and answer? Or was it just tell me what happened and you talked about it?

A Both.

Q Both? How did it change from one character to the other, when it did?

A Depending on whether I asked an open-ended question or a specific question.

Q Well, then you asked the questions and he responded?

A That's correct.

Q And then when he stopped responding, you asked another question and he responded?

A That's correct.

Q So the character of the interview was determined by you, and you called the shots as to what you were going to talk about?

A That's correct.

Q Now, other than what you have there in Commonwealth's Exhibit Number 44, did you write anything

else down?

A Well, I took notes while we were having this conversation.

Q Did you take notes during the entirety of the conversation?

A Yes.

Q And why did you not ask Mr. Kasi to read and sign your notes, instead of the distillation as to the exhibit that's Commonwealth's Exhibit Number 44?

A Because this was a much clearer form for him to sign than my notes.

Q Is there a form to sign?

A Yes, to clearly and accurately depict what he had told me about the offense.

Q Well, aren't your notes, contemporaneous notes made during the interview, the vast evidence of what he clearly and accurately said during the interview?

A Well, to me.

Q To you?

A Maybe not to someone else.

Q So you determined that, what it would look like to someone else, and then you made that notation, and then you asked him to sign that?

A No. What I'm saying is that my notes may not be clear to you if you looked at them. They are very clear to me. This is very clear to me what he wrote (indicating).

Q So are you saying that your notes are fragmentary?

A No.

Q Are legible?

A They are legible.

Q What makes your notes less useful to someone reading them than what you've chosen to put down as Commonwealth's Exhibit 44?

A Because there's many sentences that aren't complete sentences. They are words or phrases.

Q But they were taken contemporaneous with what was being said?

A Correct.

Q And they accurately reflected what was being said?

A Correct.

Q But you're just saying that wasn't any more accurate than the two-page version that you have there?

A This is just a summary of what he said happened

in regard to the events.

Q Now, I believe Mr. Horan asked you -- in fact, I know Mr. Horan asked you if prior to your asking Mr. Kasi to sign this document -- he asked you did you give him any hope of leniency.

A He asked me that question, yes.

Q You said no?

A I said no.

Q Or any hope of a reward, and you said no?

A Correct.

Q And he also asked you if you gave him any indication that if he did not give you a statement something bad would happen to him.

A I did not say that.

Q Did you give him any indication that if he did say something to you, something bad would happen to him?

A No.

Q Do you consider being on trial for capital murder something bad?

A Certainly.

Q And would you consider using a distillation of his statement that you wrote down something bad?

A What do you mean, something bad?

Q Is it good for him?

A He gave it to me freely.

Q Now, these are your words, or his words, that I freely and voluntarily provide this statement?

A Those are my words.

Q And he just signed off on it?

A Well --

Q After he read it?

A After two things -- I read it to him, and then he read it.

Q Okay. Now, on the second page of that document, about the middle of the page, where it says, "The next day I returned to Pakistan. This statement is accurate and correct." Do you see that?

A Yes.

Q Now, that appears to be the end of the statement, and then you pick up again, also several days before.

A Uh-huh.

Q What made you decide that that was not the end of the statement and you needed to have that additional paragraph?

A Actually, it's just a matter of that I wrote --

I had been up for five days when I wrote this, and that the sentence, "This statement is accurate and correct," should have been after the last paragraph.

Q Right.

A It's not.

Q Well, you wrote it before you wrote the last paragraph.

A True.

Q So when you wrote it, you thought you were done?

A No.

Q That's not fair? That's not a fair assessment?

A No.

Q So when you wrote, "This statement is correct and accurate," you knew you were going to keep writing?

A I did.

Q And you had been up for five days?

A Yes.

Q Now, is the fact that you were up for five days reflected in a -- are you saying that this is disjointed because of the way that you were thinking at the time?

A No.

Q Then what does you were up for five days have

to do with the misplacement of that statement?

A Well, that perhaps with a little more sleep, I might have put that one sentence at the end, instead of a paragraph shy of the end.

Q Do you have your notes with you today?

A I do.

MR. ROMANO: Your Honor, could we have the witness produce the notes, where we might be on the same page he is with respect to his testimony?

MR. HORAN: There's no authority for him to do that under Virginia law.

THE COURT: I don't know of any reason why you're entitled to that.

MR. ROMANO: Your Honor, if he's testified from his independent recollection of what happened on the 17th of June, maybe that's true.

But he said he consulted his notes before he came in here and I think we have a right to know whether what he's testified to is from his memory of what happened on the 17th or what he remembers having written down, having read it again last night.

THE COURT: Well, if you have some authority -- I know that lawyers say that all the time, but I don't

think there's any authority for it. And if you have some authority for it, I'll be glad to look at it.

Otherwise, consistent with my reading of the law, you're not entitled to it.

MR. ROMANO: Your Honor, maybe had I known that there were other notes, that maybe we would be prepared for that.

THE COURT: I sustain the objection.

BY MR. ROMANO:

Q Now, how did the interview end?

A With the statement.

Q With the two-page statement?

A Correct.

Q And you were done talking to Mr. Kasi about, what, three and a half hours into the flight?

A By the time this was done, approximately.

Q And then another 17 hours went by?

A Well, no. Because of the time difference, we actually weren't in the air 21 hours. Do you understand? Because of the time difference --

Q Well, it's not a 21 hour flight. It's a twelve-hour flight with a nine-hour kicker for Pakistan time.

A Correct.

Q So you were in the air twelve hours?

A Correct.

Q And was there any other conversation after the three and a half hours that you had that ended in this statement? Did you have any other conversation with Mr. Kasi?

A Other than about food and water and going to the bathroom.

Q So he was just sitting there with six FBI agents for another six and a half to seven hours?

A That's correct.

Q At any time during your note taking, did -- Well, was Mr. Kasi aware of what you were writing? Could he see it from where he was?

A He was sitting directly across from me.

Q How far away?

A About the width of -- (indicating.)

Q And you were facing each other?

A Just like this, just like I'm facing you.

Q Were you writing your notes, your contemporaneous notes, on a pad similar to the paper that is reflected there?

A This was taken out of the pad it was written on.

Q And your notes were also written and then you distilled them into that?

A Correct.

Q On the same pad? Did Mr. Kasi ever -- Well, let me ask you this.

When Mr. Kasi would say something to you, would you then say it back to him to make sure it was accurate?

A Sometimes.

Q I mean did you say, do I understand you correctly; is this what you're telling me?

A Sometimes I did.

Q Was there any point during that interview that he said, no, that's not what I said?

A He never said that.

Q Was there ever a point when you wrote -- well, let me ask you this. Let me give you a specific example.

Did you write down at one point the name Iran, and he said no, that should be Iraq?

A I don't recall.

Q So you don't recall there ever being a time when he said, no, no, that's not right; change that?

A I don't recall that.

Q In essence, what you're saying is that this is an accurate distillation of what Mr. Kasi told you on the plane back? This is a copy of that? This is Commonwealth's Exhibit Number 44, right?

A In reference to the events, that is correct.

Q And there is nothing of substance, that you thought was substantive, that you did not include in this statement?

A Correct.

Q And if there had been, you would have put it in there?

A Correct.

Q And it's not unfair to say that you anticipated that Mr. Kasi would be in court and you would be testifying?

A Are you asking me did I anticipate that happening?

Q Yes.

A The answer is yes.

Q And when you prepared that document, did you anticipate that that document would be utilized in that way?

A Yes.

MR. ROMANO: The Court's indulgence for a moment.

(Brief pause while Mr. Romano conferred with his other counsel.)

MR. ROMANO: Your Honor, I was wrong. I have no more questions for the agent.

THE COURT: Anything on redirect?

REDIRECT EXAMINATION

BY MR. HORAN:

Q Agent Garrett, do the photographs that you identified show some scratches on his arm, on one arm?

A Yes, sir.

Q And show some scratches on his back?

A That's correct.

Q Do you know when those scratches occurred?

A I do.

Q When was that?

A In the hotel room.

Q When you handcuffed him in the hotel room, where was he located? On the floor or what?

A On the floor -- he was on the floor.

Q And once you handcuffed him on the floor, what

did you do with him?

A Moved him to the bed, face down.

Q With his hands behind him?

A Correct.

Q At some point you rolled the hood up that was placed over his head?

A That's correct.

Q What was the reason for rolling up the hood?

A I was concerned about how warm it was and his difficulty in breathing.

Q And so how far did you roll the hood up?

A Up to the bottom of his nose, so that his mouth and the bottom of his nose were exposed.

Q Once you did the drive from the airport facility to the holding facility, Joyce was with him during that ride?

A Correct.

Q Did you see him after he arrived at the holding facility?

A Later in the day.

Q Was there any difference in his appearance between the last time you saw him that day and the way he appeared in the holding facility?

A No.

MR. HORAN: I have no further questions, Your Honor.

THE COURT: May he be excused?

MR. HORAN: Yes, he may, Your Honor.

MR. ROMANO: Yes.

THE COURT: You're excused and free to go or stay, as you wish. Thank you.

(Witness excused.)

THE COURT: Okay; that's today. I want to talk to you all about something of timing.

You know -- I think I've talked to you all about my cocoon theory, that you build a cocoon around yourself so you don't get any information from any other source.

I suspect that's not a comfortable cocoon and so I want to move the case in terms of time as quickly as we reasonably can and have as little time for you to be in the cocoon as I can.

All that by way of saying I thought about the possibility, depending on the timing, of sitting on Saturday. And I want to know, not necessarily right this

minute, but perhaps tomorrow, how that would sit with you.

We would never sit on Sunday, but if we sat on Saturday, I don't know whether that would create any problem for anybody -- but if we did, then we might be able to conclude a little earlier, and there would be less time that you would be out in the big world with the cocoon around you.

In here, you don't have to worry about the cocoon, because we cocoon you. But out in the big world, you're responsible for your cocoon.

So I'd like you to consider whether that would be a possibility. We need to take one day of break, but that's a possibility that I'd like for you to consider. If that creates an undue hardship, we'll talk about that.

We're not going to decide that this minute. And it may or may not come to pass because of the timing of the case, but I want you to think about that.

MR. HORAN: Your Honor, I would like to advise the Court at this juncture that the Commonwealth rests.

THE COURT: Well, actually you don't quite rest, because we still have the cross examination of Mr. Miller to take place tomorrow.

So you can tell me and have just told them that you don't have anymore witnesses after we conclude with Miller, as I understand it.

MR. HORAN: Yes.

THE COURT: But we postponed his final examination until tomorrow morning, so --

MR. HORAN: I had forgotten.

THE COURT: Okay.

MR. GOEMANN: Your Honor, it would be amenable to -- if Commonwealth wants to rest without cross examination of Mr. Miller, if then you strike all the direct examination of Mr. Miller and everything that follows from it.

(Laughter.)

THE COURT: Well, it is getting late in the day, isn't it?

(Laughter.)

THE COURT: I don't think we'll quite do that. Anyway, so be thinking about that, and it's possible that we could have a Saturday session.

Just think about it -- or part of a Saturday, anyway.

The usual speech. I've sort of run out of

steam of this speech. I don't have any new way to say it.

I wonder if one of you would like to give -- no, no.

(Laughter.)

THE COURT: Don't let yourself get any information anywhere about this case.

There will obviously be publicity about the case. After the case is all over, you can go back and see all the publicity that there was; but I guarantee you that there is publicity about it from many different sources and you are to avoid any publicity about this case or anything that is remotely related to it. You've heard a lot of other things today now that might be in some peripheral way related to this case.

Avoid hearing, reading, seeing anything related, anything that has anything to do with this case, and avoid discussion with any family members or friends.

Continue to say to those people who ask you what you've been doing, jury duty. Next question, whatever it is, the Judge says I can't talk about the case.

By now, most of them have figured out what you're doing that know you well. So you need to be

particularly careful to stop them from having any conversation with you whatsoever.

And don't let yourself get any information from anywhere that would help you in any way decide this case.

You are going to decide the case based on the evidence you heard, the testimony you heard from the witness box and the evidence that's introduced, the law that I tell you, and the argument of counsel. Those are the things you are going to decide the case upon.

So we'll start at 9:00 o'clock in the morning. The Bailiff will tell you when and where you need to be so we will be ready to go at 9:00 o'clock.

Have a nice evening. Good night to you.

Counsel remain for a minute to talk about the timing.

MR. ROMANO: Can I make a request that since we have to talk to this expert overnight, is it possible for us to just go at 10:00 tomorrow, so that I have some time in the morning, if it's necessary?

THE COURT: Yes, 10:00 tomorrow, 10:00 o'clock tomorrow.

MR. ROMANO: Thank you, Your Honor.

THE COURT: They will tell you when and where

you need to be for 10:00 tomorrow.

(Whereupon, at approximately 5:16 o'clock p.m., the jury members retired from the courtroom.)

THE COURT: However, I'd still like to see Mr. Goemann and Mr. Horan here earlier than that to talk about the other issues, the legal issues that were raised.

MR. HORAN: Is quarter to 10:00 all right, Your Honor?

(Laughter.)

THE COURT: That will probably do it. How about 9:30?

MR. GOEMANN: I think I can manage that.

THE COURT: And I think if you are here, Mr. Romano then can still be taking care of the other matters.

And we'll do it in court so that Mr. Kasi can hear what we're doing. But we know the issues that we have, and you've had a call made about the other matter that we've talked about, the instruction?

MR. HORAN: Yes.

THE COURT: Have you got instructions ready?

MR. HORAN: I've got some of them ready, yes.

THE COURT: Well, does Defense have

instructions ready?

MR. ROMANO: Yeah, we've got some instructions ready, Your Honor.

I wasn't privy to the conversation at the bench, but I would imagine that there is one particular instruction that may be causing you some trouble.

It's been causing us trouble, too. So I guess pending the resolution of that.

THE COURT: Can you share with them what you found out about that instruction?

MR. HORAN: Yes, I will. I don't know what it is right now, but I will let them know what the argument was in the Supreme Court.

THE COURT: When are you going to let them know?

MR. HORAN: Tomorrow morning.

THE COURT: Okay. I don't know what we're going to do about instructions.

I sort of wanted you all to exchange them and I don't know that there is a lot of controversy about them in this case.

But that may create a problem, and I don't know what the problem is myself, and you don't, either. So

we're all equally ignorant and we'll equally become informed tomorrow.

But we'll start court at 9:30 in the morning, jury at 10:00; okay?

MR. HORAN: Yes, sir.

THE COURT: Recess until then.

(Whereupon, the hearing in the above-entitled matter was recessed to reconvene the following morning, Friday, November 7, 1997, at approximately 9:30 o'clock a.m.)

* * * * *

CERTIFICATE OF COURT REPORTER

I, CHRISTINE G. SWANSON, a Certified Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceedings and thereafter reduced the same to typewriting; that the foregoing is a true record of said proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

_____

CHRISTINE G. SWANSON
Certified Verbatim Reporter

Supreme Court, U.S.
FILED

98 1812 MAY 6 - 1999

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MIR AIMAL KASI

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

On Petition for a Writ or Certiorari to the

Supreme Court of Virginia

APPENDIX - VOLUME II

APPENDICES X THROUGH CC

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1638

APPENDICES — TABLE OF CONTENTS

VOLUME II

APPENDIX X

Transcript of hearing in Virginia Trial Court on Defendant's Motion to Suppress Evidence seized in violation of the Fourth Amendment.....200

APPENDIX Y

Transcript of evidentiary hearing in Virginia Trial Court on Defendant's standing to assert the Fourteenth Amendment..241

APENDIX Z

Motion To Suppress Evidence and Memorandum of Points and Authorities in Support Thereof.....324

APPENDIX AA

Commonwealth of Virginia's Response to Motions to Suppress.....330

APPENDIX BB

Transcript of hearing in Virginia Trial Court on Defendant's Motion regarding the Extradition Treaty.....336

APPENDIX CC

Transcript of hearing in Virginia Trial Court on Defendant's Motion regarding the Vienna Convention.....345

APPENDIX X

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----------x

COMMONWEALTH OF VIRGINIA, :

vs. : CRIMINAL NO.79148

MIR AIMAL KASI :

a/k/a MIR AIMAL KANSI, :

Defendant. :

----------x

Courtroom No. 4H

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

PARTIAL TRANSCRIPT

(The Court Reporter was sworn.)

THE COURT: Okay. You have motions today?

MR. GOEMANN: Yes, Your Honor. Does the Court have any preference in terms --

THE COURT: No. Just let me know what we're arguing is all.

MR. GOEMANN: Your Honor, first --

MR. HORAN: Your Honor, I wonder, if we might, in the interest of time. On some of these motions, I will stipulate to exactly what the allegations are of the defense in this case.

I will stipulate for purposes of argument on this record that the Defendant was arrested in Pakistan by an FBI agent; for purposes of this record I will concede that the FBI agent doesn't have any jurisdiction in the nation of Pakistan; that he was not taken before a judicial officer as was alleged in Ms. Meleen's motion until he returned to the United States and was presented before this Court.

That in the course of time from his arrest until he was brought to this country there was no compliance with the Vienna Convention until my letter of July 3rd,

that counsel for the defense, as is alleged in Ms. Barger's motion.

And that the seizure in Pakistan was not made pursuant to any Pakistani paper or document which would allow him to be seized under the laws of Pakistan.

Your Honor, I make that stipulation because I would suggest to the Court that on three of the four motions they are legal argument, really. I will stipulate the underlying facts of the legal argument on each of those is proper which would leave us with the fourth motion to suppress, which is Mr. Goemann's motion which deals with Miranda and voluntariness.

MR. GOEMANN: Your Honor, could I ask for a brief recess to talk with my co-counsel about these stipulations and the affect they might have on the motions we have presented today? This is the first I'm hearing about it and I'd just like a brief recess to --

THE COURT: Okay. We'll take a five minute recess.

MR. GOEMANN: Thank you.

(Brief recess.)

THE COURT: Something that occurred to me while I was out there in terms of time is I don't know whether

PAGES REGARDING OTHER MATTERS EXCERPTED

Okay. So, she may go and I think then we're on with your --

MR. GOEMANN: Your Honor, there was one other quick preliminary matter, motion for change of venue. I'd be asking that that be continued to the 27th. We've just received some more video tapes over the weekend and I haven't had a chance to review them.

THE COURT: Any objection to continuing that to the 27th?

MR. HORAN: No, Your Honor.

THE COURT: Okay.

MR. GOEMANN: Thank you. With respect to the other motions, Mr. Horan's stipulations certainly do make things a bit easier on each of them. But ultimately we've come to the conclusion that we don't believe they resolve any of them completely, at least without taking up some evidence.

The first one, and this might be almost the simplest one in a way is the motion to suppress evidence based on the illegal seizure.

Mr. Horan's -- so I'd like to take that one up first, Your Honor, on the 4th Amendment grounds.

THE COURT: Okay. I'm not -- when you file

these, I'm not sure what specific -- I want to know that I've got the right motion in front of me. So how about coming up here and finding me the motion you're talking about.

MR. GOEMANN: Yes, Your Honor.

THE COURT: If you're talking about a discreet motion so I know which one you're arguing. There's some overlap in all these, I understand. But I want to know what motion I'm dealing with.

MR. GOEMANN: This would be the first one (indicating.)

THE COURT: Okay. This is titled motion to suppress evidence and begins in paragraph one stating sometime in June of 1997 the Defendant was abducted.

MR. GOEMANN: Yes, Your Honor.

THE COURT: That's the motion.

MR. GOEMANN: And the gist of the motion is that Mr. Kansi was seized in an unreasonable fashion. That he was in Pakistan, which is -- has been stipulated now by the Commonwealth, and that his seizure was a violation of both the laws of the United States and of Pakistan. And the laws that were violated were the extradition treaty that existed between the United States and Pakistan, and

the individual statutes regarding extradition that exist in the United States and in Pakistan, and I attached a copy of the Pakistani statute to my motion and cited the actual treaty in the United States and the extradition statute in the United States, at 18 U.S.C 3181.

I do have a copy of the treaty itself, if the Court -- which I'd just like to hand up.

THE COURT: All right.

(Mr. Goemann hands a document to the Court.)

THE COURT: Can I see if I can narrow this a little bit.

Put aside for the moment the Constitution. All right. And just focus on the treaty. Are you suggesting that if there is a violation of a treaty, a motion to suppress stands on that basis?

MR. GOEMANN: No.

THE COURT: So we all agree, then, that a treaty is like -- is like a law and there is no -- if it does not rise to the level of a constitutional violation, a violation of a treaty, as a violation of law, unless it specifically states, does not give rise to a dismissal of the indictment or a suppression of the evidence.

MR. GOEMANN: Well, I want to withhold making

any statement regarding dismissal of the indictment. There's another motion pending regarding that.

THE COURT: All right. Doesn't rise to the level of suppressing evidence.

MR. GOEMANN: That's correct.

THE COURT: And the same thing with regard to -- well, is it just the treaty you're relying on or --

MR. GOEMANN: The treaty and the extradition acts of the United States and Pakistan.

THE COURT: The extradition acts of the United States would not be a basis in and of themselves for a suppression of evidence.

MR. GOEMANN: That's correct, Your Honor.

THE COURT: The extradition act of Pakistan is or is not in and of itself?

MR. GOEMANN: Is not.

THE COURT: All right.

MR. GOEMANN: In and of itself.

THE COURT: Then your argument is that all those things taken together with the facts and circumstances of how he was abducted give -- violate his 4th amendment right.

MR. GOEMANN: That's correct, Your Honor.

THE COURT: And how does he come within the protection of the 4th amendment right? How does he come within the 4th amendment? Who is he that allows him to claim protection of the 4th amendment?

MR. GOEMANN: He is a person that was seized by the United States and by the Commonwealth of Virginia in Pakistan.

If the Commonwealth wants to argue that he, the person who was seized, is not a person protected by the 4th amendment to the United States Constitution, I believe it's up to the Commonwealth to show that.

THE COURT: I think it's the other way around.

MR. GOEMANN: Well, Your Honor, if I may --

THE COURT: I think you've got to show that he is a person who is entitled to that protection in Pakistan.

MR. GOEMANN: Your Honor, if the Court's position were correct, a preliminary showing in virtually every motion to suppress that we litigate would be a presentation of a birth certificate or a passport.

THE COURT: No. Because if it's in this country, then that might be the basis for it. But you have someone who was -- who was -- something was done to

in a foreign country and I think if you're going to claim that that person is entitled to the protection of the laws of this country or the constitution of this country, the burden's on you to show some -- something that brings him within that purview under the law.

MR. GOEMANN: Your Honor, I believe that the Supreme Court case of Reid, R-E-I-D versus Cobert, C-O-B-E-R-T, 354 US 1 1957, says that the location of the seizure doesn't matter in terms of whether the 4th amendment applies or doesn't apply. So I don't think that -- and in that case there was a seizure outside of the country. And so the mere fact that this occurs outside of the United States does not take the Defendant outside of the protections of the Constitution.

There is no evidence -- I think that the Commonwealth has to show that this person that they seized, if they seize someone and they want to claim that that person is not entitled to the protections of the Constitution, they have to show it. Just like in an immigration case, and of course this is an in exact analogy, but in a deportation proceeding it's up to the government to show alienage, and I think that's basically what we're talking about here.

But in a deportation case, the government has to show that the person being deported -- and they have to show it by clear and convincing evidence is an alien and then it would be up the Defendant in that case to come forward with some evidence to show that despite being an alien, they have the right to be present. But it's up to the government.

And this is the same idea. In each case the government is trying to strip the person that they have brought before the Court of rights and the default position, I suggest, is that when the government seizes somebody and brings them into court the constitution applies to that person. That in essence is the underlying assumption. That's the assumption that we start out with. And if the government wants to take the person out of that category, after they seize them, they have to show.

In addition, Your Honor, it makes sense in terms of who has the information regarding this. Citizenship or a person's status, vis-a-vie the government, is a construct of the government. So whether a person is a citizen or an alien or a permanent resident or has a work permit, those are all statuses created by the government. They're not something that is subjective from the

individual. It's not something you're born with, it's not something that the individual creates by their mere presence.

Here we have a person who was seized by the government, and if the government wants to show that one of these constructs, these categories that they have created take the Defendant outside of the protection of the constitution, then it only makes sense that they should be the ones to show which of these constructs applies and why does it rob the Defendant of the protections of the constitution. And I think Reid makes clear that it really doesn't matter where it takes place.

The operative point is that the government of the United States is the one that made the seizure. And there are some Circuit Court opinions that talk about the 4th Amendment applying to a particular case and the threshold question is does the 4th Amendment apply, and the exclusionary rule apply to a seizure in a foreign country.

And there are two ways that it can apply. And, Your Honor, I would cite the Court to a 9th Circuit case, United States versus Barona. And I do have copies for the Court and Counsel.

And Barona is helpful because it lays out a -- a system for approaching these cases. In Barona there are basically wiretaps, foreign wiretaps and defendants are brought to the United States and prosecuted based on wiretaps that occur in Denmark.

And I would cite to the Court to -- beginning at page 1090 under A. The general proposition is that seizures that occur in foreign countries -- the 4th Amendment does not apply. However, we have stipulations here which get us over that hurdle.

And the two exceptions that the Court talks about is first, if the circumstances of the foreign search and seizure are so extreme that they shock the judicial conscience, than an appellant court can exercise its supervisory powers. That's one exception.

The other exception is if there is a joint venture between the United States and foreign officials in the seizing of the person.

So the threshold question is not what is the status of Mr. Kansi, but did the United States government go over and seize someone.

And the stipulations that have been entered into already, I believe, clearly show that. That the FBI did

-- arrested a Pakistan -- Mr. Kansi was arrested in Pakistan by FBI agents.

On the second column on page 1091, talks about the second exception to the inapplicability of the exclusionary rule applies when the United States agent's participation in the investigation is so substantial that the action is a joint venture between the United States and foreign officials.

Well here, there's no question if -- and if a joint venture is found to have existed, the law of the foreign country must be consulted at the outset as part of the determination whether or not the research -- excuse me, the search, was reasonable.

So the first question is did the United States engage in a joint venture with the Pakistan government, or at least a joint venture.

And here, I believe the stipulation -- more is adequate to establish that.

THE COURT: I didn't hear that. I missed that.

MR. GOEMANN: Mr. Horan, the first stipulation was that Mr. Kansi was arrested in Pakistan by FBI agents.

THE COURT: Yes. What does that tell me about cooperation with Pakistan?

MR. GOEMANN: What this is going to is not how much Pakistan was involved, but how much was the United States involved.

THE COURT: I thought you said that you were talking about a joint venture between this country and Pakistan.

MR. GOEMANN: Well, at least --

THE COURT: Which is what this case seems to say. If a joint venture is found if exists then the law of the foreign country must be consulted and so on and so forth. I didn't hear a stipulation with regard to the cooperation by the government of Pakistan.

MR. GOEMANN: Your Honor, I don't think that's required. I think what they're talking about in this case is the foreign government's sole action versus action solely on the part of the United States.

And in order to invoke the 4th Amendment, there has to be some minimal participation by the United States, not by the foreign government.

It's sort of -- and when they're talking about a joint venture, what they're saying is the United States must have participated at least to the point where it becomes a joint venture. In other words, it can't be

solely the Pakistani authorities that are acting here. If the Pakistani authorities were the only ones who acted they created the seizure, then this doesn't apply.

THE COURT: I'm not following your argument way back a moment ago. Because I thought you told me that it's your argument that the 4th Amendment has extra territorial effect.

So you're not dealing with whether there's an exception to the non-applicability or not, your argument is that the 4th Amendment has extra territorial effect, and the government has to follow it in Pakistan.

This case says that omnibus crime act does not have extra territorial effect and then they get into the exceptions being one where it shocks the conscience; and two, where it's a joint venture. So how you're getting from point A to point B is beyond me.

MR. GOEMANN: I'm sorry, Your Honor. Let -- what I'm saying is under the circumstances of the case, when the FBI goes to a foreign country and seizes somebody and brings it back to the United States, then the second exception applies and the --

THE COURT: The second exception to what?

MR. GOEMANN: The exception to the rule that the

4th Amendment does not normally apply outside of the United States.

THE COURT: So there is -- we agree there is a rule, then, that the 4th Amendment does not ordinarily apply outside the United States and we're back to my question to you, how do you bring him within the protection, and you said you don't have to, but now you say, yes, you do because you agree he doesn't -- it doesn't apply outside the United States, and you're trying to come within an exception to that general rule.

Is that where we are?

MR. GOEMANN: No, Your Honor, I'm sorry --

THE COURT: No.

MR. GOEMANN: There are two separate questions regarding whether the 4th Amendment applies. One is does the 4th Amendment apply to this seizure. And the second is is this person someone who is someone protected by the 4th Amendment.

THE COURT: So are you saying it doesn't apply to this seizure generally because it was outside the United States, and you want to come within an exception to that general rule, is that what you're saying?

MR. GOEMANN: Yes. In other words --

THE COURT: Okay. So we agree that -- forget the person for a moment. The 4th Amendment has no extra territorial effect unless, and you're arguing there are two exceptions.

MR. GOEMANN: Yes.

THE COURT: Is that why we're getting to where you are?

MR. GOEMANN: Yes, Your Honor.

THE COURT: Okay.

MR. GOEMANN: Thank you for the directions.

THE COURT: I'm not giving you directions. I'm trying to --

MR. GOEMANN: No, no.

THE COURT: -- understand what you're saying. I understand things by talking back.

MR. GOEMANN: I appreciate --

THE COURT: Some people really can't gather that.

MR. GOEMANN: -- your guidance in helping me to focus the argument. Yes. The 4th Amendment -- if a foreign country seizes somebody the 4th Amendment of the United States has no effect over there.

THE COURT: Well, suppose the FBI seizes

somebody in the foreign country. Generally, does the 4th Amendment apply?

MR. GOEMANN: Yes.

THE COURT: Well, then, why do you need an exception to the 4th Amendment to get you within it?

MR. GOEMANN: Because there are situations where the FBI or the United States government is not the person that is -- is not the --

THE COURT: Well, here it is the FBI so you don't need to talk about any exceptions, right? You just automatically -- the Constitution applies -- I mean, the 4th Amendment applies because he was seized by the FBI as the stipulation said. Is that right?

MR. GOEMANN: Well, I would say that the seizure by the FBI brings him within this number two, this second exception, that is --

THE COURT: Second exception to what?

MR. GOEMANN: To the normal rule that the 4th Amendment does not apply outside of the United States.

THE COURT: So when a person is seized by the FBI in a foreign jurisdiction under normal circumstances the 4th Amendment does not apply but it does apply in two exceptions, one of which is where there's cooperation of

governments?

THE COURT: Is that the argument?

MR. GOEMANN: No, Your Honor.

THE COURT: No.

MR. GOEMANN: The 4th Amendment does not apply if -- if somebody other than a United States agency --

THE COURT: Well, we know that's not this case because Mr. Horan stipulated.

MR. GOEMANN: That's right.

THE COURT: So is it --

MR. GOEMANN: That's the general rule. That's the general rule.

THE COURT: But never mind the general rule because the general rule doesn't apply here because it was the FBI.

MR. GOEMANN: That's right. So that does bring it within the exception to the general rule.

THE COURT: What exception?

MR. GOEMANN: The exception that if the government does at least participate in the seizure --

THE COURT: Where do you get that exception out of this case? This case says if a joint venture is found to have existed, the second exception applies when the

United States' participation is so substantial that the action is a joint venture. It's what it says at paragraph three, marked three and four on page 1091.

MR. GOEMANN: Yes, Your Honor. And what that is -- what that is guarding against is a lack of the United States involvement. A lack of United States involvement. That -- what that exception is talking about is if the United States has to have some involvement in this seizure for the United States Constitution to apply, and it has to rise up to the level of at least a joint venture.

In other words, if the FBI -- let's take the most -- the most extreme example of the general rule. Pakistani authorities make the arrest and the FBI has nothing -- the United States has nothing to do with it. They just turn him over. The Pakistani authorities did it all. The general rule would apply. The 4th Amendment does not apply there and there's no protection.

Now what if the FBI gave some information to Pakistan to lead them to make the arrest. Well, there's some United States involvement in that. Does that rise to the level of a joint venture? Well, I think that's a question of fact.

What if the FBI went over to Pakistan and

directed Pakistani agents on how to make the arrest. Is that -- does that rise up to the level of a joint venture.

See, the more the FBI or --

THE COURT: What if the FBI goes over there without any -- by your leave of the Pakistani government at all and does all itself?

MR. GOEMANN: Well, then I think that it clearly applies because then you have an arrest -- the seizure being made by a United States government agents.

THE COURT: Well, then why would we look to the law of Pakistan, which is what this case says we do?

MR. GOEMANN: To see if the United States -- if it was reasonable for the United States agents to go in and violate another country's laws.

THE COURT: Do you got any other case than this one? This case talks solely about joint venture and I am -- are we going to get some evidence somewhere? Am I just hearing an opening statement or are you making your argument? I don't know whether we're --

MR. GOEMANN: Well, Your Honor --

THE COURT: I only know what I have before me, so --

MR. GOEMANN: The Court's indulgence, I do have

another case here, Your Honor. I'm trying to see if --

THE COURT: Well, what I want to know, first, is whether you're talking -- whether you're just arguing -- whether you're arguing the whole case now or whether I'm going to hear some evidence and I ought to be quiet until at least I hear all the evidence. You probably think I ought to be quiet, period. You won't get that.

MR. GOEMANN: Well, Your Honor, I guess I'm trying to see if we need evidence. Let me quote from this case, Your Honor. It might elucidate this a bit more. And here they're talking about the limited exceptions.

Generally, neither our 4th Amendment nor the judicially created exclusionary rule applies to acts of foreign officials.

There are only two very limited exceptions to this general principle. First, if American law enforcement officials participated in the foreign search or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked.

Second, if the circumstances of the foreign search and seizure are so extreme that they shock the judicial conscience, a federal appellate court, in the

exercise of its supervisory powers can require exclusion of the evidence.

And my argument, I suppose, concerning the language in Barona is based upon that -- that background. Barona cites to this case, which is United States versus Lachapelle, L-A-C-H-A-P-E-L-L-E, 869 F 2d 488, that's another 9th Circuit case from 1989.

Barona, I suggest, simplifies the language, or in our case, actually, complicates it greatly, I suppose. But first, if the American law enforcement officials participate in the foreign search or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be evoked.

That, I believe, is what they're talking about when they say it has to be at least a joint venture in Barona. So if the FBI -- if things are being done at the direction of the FBI, then the 4th Amendment and the exclusionary rule apply.

And in this case, they were being done by more than just the direction of the FBI, they were actually being done by the FBI. So I don't see how there could be any question that the 4th Amendment governs our own

government agents going into other countries. And I believe Lachapelle and Barona clearly state that.

Now if that is true, then we get to the question of whether Mr. Kansi is a person that is protected by the 4th Amendment protections.

Now, I -- it was my contention that there wasn't need for the taking of evidence on this particular point because this stipulation sufficed to show that the United -- agents of the United States were participating in the seizure to such an extent as to -- as to require the applicability of the 4th Amendment. If the Court does not find that sufficient, then I think then there is going to need to be evidence.

THE COURT: If I don't find what to be sufficient for what?

MR. GOEMANN: That Mr. Kansi was arrested in Pakistan by FBI agents, if that is not sufficient to cross this -- this threshold to show that law enforcement officials participated in the foreign -- this says search, but I submit it's search or seizure, if that is not sufficient -- if that stipulation isn't sufficient to show their participation, then I suppose that evidence is going to be required. I suggest to the Court that it does.

THE COURT: Well, suppose it was and you get beyond the threshold question of the 4th Amendment applying, is there going to be some evidence about what happened? How do I know any -- there was any violation of the 4th Amendment from the stipulation?

MR. GOEMANN: The violation --

THE COURT: What does the stipulation tell you about that? Factually whether there was a violation.

MR. GOEMANN: It doesn't, Your Honor --

THE COURT: So we're going to have evidence on that.

MR. GOEMANN: Well, first Mr. Horan defends -- defends this issue not on whether the search itself was unreasonable or not but whether Mr. Kansi is a person --

THE COURT: Well, surely, I would have to find something with regard to the unreasonableness of it. Wouldn't I? If I agreed that the 4th Amendment applied --

MR. GOEMANN: Yes.

THE COURT: Surely I would have to find -- then I would get to the factual question, was the seizure unreasonable.

MR. GOEMANN: And I think the Commonwealth has the burden of proof of that, Your Honor. They have

stipulated that the seizure in Pakistan was not pursuant to any Pakistani paper or document and there is no -- there's nothing that I've seen in this case that would allow his seizure in Pakistan, pursuant to a warrant issued by this Court. And a capias, of course, is not -- does not operate outside of the boundaries of the jurisdiction. So what we have here is a warrantless seizure, and the burden of proof therefore is on the Commonwealth to show that it was reasonable.

THE COURT: Why doesn't the warrant apply outside the United States?

MR. GOEMANN: Your Honor, the -- if I may, there's a Virginia statute, 19.2-236, when process of arrest in a criminal prosecution is issued from a court, either against the party accused or a witness, the officer to whom it directed or delivered may execute it in any part of the Commonwealth.

THE COURT: Okay. So you say that -- it does not have any extra-territorial affect beyond Virginia is your argument.

MR. GOEMANN: Yes, yes.

THE COURT: Okay.

MR. GOEMANN: So there would need to be some

other process to show that it was -- that there was some sort of warrant to something to shift the burden back. But other than that, the Commonwealth would have the burden of showing that this was a reasonable seizure.

THE COURT: Okay. Have I heard everything you're going to say and present on this issue? Or are you going to present any evidence? I don't know where we are.

MR. GOEMANN: Your Honor, I believe that the Commonwealth has the burden of showing that the 4th Amendment does not apply to my client. Which is the grounds that they defended on in their opposition.

If the Court finds that it's my burden, I would ask for a continuance to subpoena an appropriate witness for that. I have not subpoenaed a witness to address that issue. For the arguments I have made earlier, I believe that it's clearly the Commonwealth's issue if they're going to say that the 4th Amendment does not apply to my client for them to show the exception to that.

THE COURT: Well, let hear from the Commonwealth, then, and see where they are. I don't know where anybody is.

MR. HORAN: Your Honor, I thought I was here to respond to the motion that said that because of the 4th

Amendment of the Federal Constitution, that the -- any statements taken from the Defendant should be suppressed. What we're really talking about is whether or not the Court adopted, the United States Supreme Court adopted exclusionary rule applies to a statement taken after a foreign arrest by an American officer.

Your Honor, I think the case law is absolutely clear that the 4th Amendment has no extra-territorial significance. The United States Supreme Court, and the United States versus Verdugo-Urquidez at 494 U.S. at page 259 in 1990 specifically held that the 4th Amendment does not apply outside the territorial confines of the United States.

THE COURT: Well, that was a case in which the United States authorities were not the arresting authority, though, right?

MR. HORAN: No. But the United States authority were the officers who did the search. The 4th Amendment violation was the United States –

THE COURT: Okay.

MR. HORAN: -- violation because the Court found that following his arrest -- what happened in that case you had a Mexican citizen --

THE COURT: Yeah; the DEA --

MR. HORAN: -- who was brought here and the DEA was the -- was the group working with Mexican officials who searched his Mexican residence and the argument, of course, at trial was that the exclusionary rule should apply. And the United States Supreme Court in Verdugo 1992, said no.

THE COURT: Do you say then that it doesn't matter whether he was -- whether he's an American citizen or has substantial contact with the United States or whatever, it's the fact that it was in a foreign country that makes the difference?

MR. HORAN: Yes, Your Honor.

THE COURT: Okay. I understand what you're saying. Go ahead.

MR. HORAN: They're making some ground, if there was allegation here that he was an American citizen who was being searched abroad, but that's not the argument here. The argument here is that the 4th Amendment suppresses the statement he made on the plane during his return to the United States. That's the claim here.

There is no way to read the United States versus Verdugo without coming to the conclusion that the 4th

Amendment doesn't apply in this situation. The United States Supreme Court says at page 267, "the available historical data show therefore that the purpose of the 4th Amendment was to protect the people of the United States against arbitrary action by their own government. It was never suggested that the provision was intended to restrain the actions of the Federal government against aliens outside the United States territory.

There is likewise no indication the 4th Amendment was understood by contemporaries of the framers to apply to activities of the United States directly against aliens --

THE COURT: Well, how do we know he's an alien?

MR. HORAN: -- in foreign territory."

Well, I don't think they make any claim that he isn't an alien.

THE COURT: Well, can --

MR. HORAN: Your Honor, they --

THE COURT: You have this -- you have an any darn fool rule that you invoke every now and then and I don't think that the record will allow that.

I don't know that he is not an American citizen from anything in the record anywhere. How do I know that?

And whose burden is it to show me that he is or isn't.

MR. HORAN: I guess we get back to the thing that you and I have disagreed upon for low these many years. I have always taken the position that at trial I have certain burdens, but pretrial he who alleges must at least go forward with the evidence to prove. Now they have the great benefit under Virginia law that this Defendant can take the witness stand safe from self-incrimination and say I'm a citizen of the United States. I would then have to show that he isn't. But he's not a citizen of the United States. He's never been a citizen of the United States.

It's their burden to bring him within any of the 4th Amendment exceptions. But their claim is a bold claim that the 4th Amendment in this case bars the statement he made through an American officer on the plane.

THE COURT: Okay. Well, let me go back and see if I can get the rule of law that you are asserting. Are you asserting that any person, citizen, alien, otherwise, who is seized by an American law enforcement officer in a foreign country does not have the benefit of the 4th Amendment --

MR. HORAN: Does not.

THE COURT: -- in the way that he was seized.

MR. HORAN: Does not.

THE COURT: Doesn't matter whether it's citizen or not.

MR. HORAN: Unless he's on American territory in some --

THE COURT: No, no. I'm talking -- no, I'm talking about non --

MR. HORAN: If he's seized in foreign territory the 4th Amendment simply has not extra-territorial significance.

THE COURT: Alien citizen or not.

MR. HORAN: Makes no difference. Doesn't apply -- it only applies within our borders.

THE COURT: And do you say that this case I can't pronounce, the Mexico case stands for that proposition.

MR. HORAN: Verdugo. Yes; it does, Your Honor. As a matter of fact, the Supreme Court in Verdugo goes to great pains to point out that the case that Counsel cited, Reid versus Covert, doesn't apply. It doesn't mean anything. Because Reid versus Covert was a 5th and 6th Amendment claim. Not a 4th Amendment claim.

And you'll find at page 270 of the opinion, the Supreme Court said to support his all encompassing view of the 4th Amendment, respondent points to language from the Parali opinion in Reid versus Covert. Reid involved in attempt by Congress to subject the wives of an American servicemen to trial by military tribunals without the protection of the 5th and 6th Amendments.

The Court held it unconstitutional to apply the Uniform Code of Military Justice to trials of American women. Four Justices rejected that the idea that the United States acts against citizens abroad, it can do so free of the Bill of Rights.

That case, Reid, involved the 5th and the 6th Amendment rights, the wives of American servicemen abroad.

It had nothing to do with the 4th Amendment and Verdugo points that out.

Verdugo has to do with the question of a Mexican citizen who is abducted by Mexican officials in Mexico delivered to the American authorities because there's an American warrant out for his arrest and subsequent to that the American officials, through the DEA, go ahead and search his Mexican premises.

So the United States Supreme Court when they got

the case said we are faced here with the question of whether or not there is some extra-territorial dimension to the 4th Amendment to the American Constitution. And Verdugo says no. Whatever it may be with the 5th Amendment and the 6th Amendment is a separate question. Verdugo says the 4th does not apply beyond the borders and that's the situation we're dealing with here.

In this case, we have -- by the stipulation, an American officer arresting this Defendant in a foreign land, bringing him back here.

Now the voluntariness question is the one that I said to Your Honor when I was agreeing to a stipulation, the voluntariness question is a fact specific question. And the evidence should be taken on that.

But here we're with the bold assertion that because of the 4th Amendment of the Federal Constitution, you can't accept any statement made by this Defendant when he's arrested in a foreign land. And I submit, Your Honor, under Verdugo, the 4th just doesn't apply. And any questions about voluntariness, that's for another witness and a different fact --

THE COURT: Well, I think everybody agrees with that. Okay. Response?

MR. GOEMANN: Your Honor, as Mr. Horan clearly read Verdugo-Urquidez far too broadly. The whole discussion in that case is regarding the status of the person who was involved. The Court deals very quickly with the fact that it had occurred in Mexico, and there's no doubt that the dimension of a 4th Amendment protections are different outside of the United States. But those dimensions change based on the status of the person who was involved.

So the first question is does the 4th Amendment apply in a foreign country; generally, no. But when the FBI goes out and does something like this, seizes somebody, it does apply.

The next question is does it apply to this particular person. And Verdugo-Urquidez very clearly talks about the distinction among people of different statuses. And they talk about people having voluntarily and presumably accepted societal -- voluntarily come to the country and accepted societal obligations. It talks about what is the status of the person that we are looking at. So there are two inquires.

And I think Mr. Horan would like to read Verdugo-Urquidez to completely wipe out the second one,

which basically means that a citizen of the United States who goes abroad and is arrested by the United States law enforcement officers and brought back to the United States can not claim a 4th Amendment violation.

The whole discussion of Verdugo is what does the people mean. And the people means citizens or people who have this substantial connection with the United States. That's their whole focus in Verdugo. What does this word, this phrase mean.

And surely if a person, a citizen of the United States leaves this country, they have not forfeited their peoplehood, they have not forfeited the protections of being part of the people of the United States. So the status of the person is crucial.

And again, Your Honor, I submit that it is the Commonwealth that has the burden to prove that status when they are asking that someone that they seized not receive the protections of the Constitution.

THE COURT: I find two things. First, I find that the status of the person is the issue in Verdugo, or however you say that word. And I find further the burden is on the Defendant to show that.

The issue that we need to address is was this

Defendant one of the people. He is asking that protection of the 4th Amendment be applied to him. He has to make a prima facia case to show that he is entitled to claim that protection and at least a prima facia case that it was violated.

Now I think once he makes that prima facia case then I, in disagreement with Mr. Horan, I guess, think the burden is on the Commonwealth to prove the facts with regard to that event.

But to bring himself within -- the Commonwealth isn't asking that anything that he be deprived of any right. He's asking that certain things be done because he's entitled to the right. And he has to show a prima facia case that he's entitled to it. In most cases, there isn't any question. Nobody, you know, everybody -- it's one of those everybody knows things.

But here, the only thing I know from the -- anything in the case about Mr. Kansi's connection with the United States is that on one day he is accused of being here. I know knowing else about it, and I think the burden is on you to show it.

If you want to rely on that and just say, you know, stop there, I guess you can and you can appeal on

that point and we'll see. If you want to go forward and present evidence that he is one of the people, I'll hear the evidence. But if you're going to rely on where you are, then I say you have not made a burden that requires the Commonwealth to go forward and he's not entitled to the protection of the 4th Amendment because you haven't made the case that he is.

So I guess you've got a choice. You can either rest there and live to fight another day or you can present the evidence and live to fight another day.

MR. GOEMANN: As much as I'd like to rest, Your Honor, right now, I will not. Let me note my exception to the Court's ruling.

THE COURT: You may certainly note your exception.

MR. GOEMANN: And I would ask, then, for a brief continuance to subpoena a witness that I believe will be able to meet the Court's burden that is placed on the Defendant.

THE COURT: Okay. What does that do to any evidence that you may have brought to -- do you have any objection, I guess? How about the 22nd. We've got the 22nd. Is that enough time?

MR. GOEMANN: If I can -- if I can get a subpoena issued today, Your Honor, I might be able to get it served tomorrow for the 22nd.

THE COURT: What's your position?

MR. HORAN: Well, Judge, the problem is that we've come in here prepared to respond to the allegations. They have made no claim either a, that he's an American citizen or that he occupies some peculiar status which makes the 4th Amendment apply to --

THE COURT: Well, they didn't do that because they erroneously thought that was your burden. I now have said it's not your burden. It's theirs.

I guess if you want to present your evidence and have me wait and see, you can do that, if you want to. If you have a problem getting your witnesses back here on the 22nd.

It's your burden to show the facts of the event if, in fact, he comes within the purview of the -- of the 4th Amendment which I don't know at this point.

MR. HORAN: They will have to get someone to perjure himself or herself to prove that he's an American citizen because he's not.

THE COURT: Well, I think -- well, I won't say

that. The issue is not is he an American citizen, the issue is he one of the people in the 4th Amendment.

So are we going to continue to the 22nd? Do you need another date?

MR. GOEMANN: Your Honor, well, the 27th. We have that date. I don't want to take any chances of having to come up and bring the witnesses again --

THE COURT: Yeah, I guess, okay.

MR. GOEMANN: -- and us being unable to subpoena a witness.

THE COURT: I guess we can do it on the 27th. We'll be busy little beavers on the 27th, I guess.

What are we continuing to the 27th? Again, I know that these motions overlap to some extent and I'm trying to keep straight what motion I'm hearing.

I have in my hand, here, the motion to suppress evidence that begin in the way that I said that sometime the beginning of June the Defendant, Mir Aimal Kansi, was abducted from Pakistan. Is that the motion we're continuing to the 27th?

MR. GOEMANN: Yes, Your Honor.

THE COURT: Are there any others yet? Or is that it as far as --

APPENDIX Y

FILED
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RECEIVED APR 23, 1998
RICHMOND, VIRGINIA

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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COMMONWEALTH OF VIRGINIA,	:	
vs.	:	CRIMINAL NUMBER
MIR AIMAL KASI,	:	79148
a/k/a MIR AIMAL KANSI	:	
Defendant.	:	

----------x

Courtroom no. 5G
Fairfax County Judicial Center
Fairfax, Virginia
Monday, October 27, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:02 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth's Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

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CONTENTS

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS
WILLIAM WHILDEN	28	46	57	65
ZAHID MIR	93	94	--	--
KHAN ASGHAR	96	99	--	--
NASIR ESHEI	103	108	--	--
JEFF FREDERICK	113	118	--	--
THOMAS CAMPBELL	124	137	--	--
DAVID CLARK	171	178	--	--

* * * * * * * * * * * * * *

EXHIBITS

	MARKED FOR IDENTIFICATION	RECEIVED IN EVIDENCE
DEFENSE EXHIBIT NOS. 1-3 (Affidavits)	72	72
DEFENSE EXHIBIT NO. 4 (Employment documents)	115	115
COMMONWEALTH EXHIBIT NO. 1 (Immigration document)	128	130

DEFENSE EXHIBIT NO. 5 (Response to FOIA Request)	145	
DEFENSE EXHIBIT NO. 7 (Newspaper articles)	194	194
DEFENSE EXHIBIT NO. 1A-F (Video tapes of news reports)	198	198
DEFENSE EXHIBIT NO. 8 (Response to subpoena)	199	199

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similar fashion, but I would ask that he be recognized to return after the break.

THE COURT: Okay; if you would please remain, Mr. Synder.

(Recess)

THE COURT: Which one are we going to do next, so I know -- if I can get it.

MR. ROMANO: The motion that was continued from last week to suppress, based on the unreasonable seizure.

(Whereupon, the Defendant entered the courtroom.)

THE COURT: Okay.

MR. GOEMANN: Your Honor, as I had mentioned before the break, we have a similar issue regarding Mr. Mir being called as a witness. I think it can be dealt with at the bench in a similar fashion. I'd ask to approach the bench concerning that.

THE COURT: Okay.

BENCH CONFERENCE

MR. GOEMANN: Your Honor, the purpose of my calling Mr. Mir would be to establish that my client was a roommate of his for approximately two months at the end of

1992 and '93. I don't know exactly what the parameters are that Mr. Mir would testify to because he hasn't been willing to speak with the defense investigator.

But, I -- as part of my burden, as the Court ruled last week, I do have to establish a connection between my client and the United States and part of that proof would be his having been a roommate in a particular location in Virginia. And that's what I would be calling him for.

I don't know if he would say -- my belief is that he would say that he was living there for at least two months at the end of 1992 and the beginning of 1993.

THE COURT: What are you asking me to –

MR. SNYDER: I think out of deference to our concerns, Your Honor, if we could do it right here at the bench, I don't think my client would have any objection to answering a question of that nature.

THE COURT: Well, do you know the answer to the question?

MR. HORAN: Not specifically. I know he was there for a period of time.

THE COURT: Okay. Well, do you have any objection to him testifying from right here?

MR. HORAN: No.

THE COURT: Okay; and is that agreeable with you?

MR. GOEMANN: That would be fine, Your Honor, yes.

Whereupon,

ZAHID MIR,

a witness, was called for examination by counsel on behalf of the Defendant, and, having been first duly sworn by the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Would you state -- tell the Court Reporter your name?

A My name is Zahid Kawaga.

Q And in 1993, did you also go by the name Zahid Mir?

A Yes.

Q And at some time during 1992, did you begin living with my client, Mir Aimal Kansi?

A Yes.

Q Do you remember approximately when that was?

A August -- August to January.

Q August of 1992?
A Yes.
Q Until January of 1993?
A Yeah.
Q And during that time period he was your roommate?
A Yes.
Q And where were you living during that time?
A In Laurel Glade.
Q Where is that located?
A Reston -- in Reston, I believe, in the apartment in Reston.
Q Was the apartment in Virginia?
A Yeah; in Virginia, Reston.
Q In the United States?
A Yes.

MR. GOEMANN: Thank you, that's all I would have.

THE COURT: Any questions you want to ask?

CROSS EXAMINATION

BY MR. HORAN:

Q That apartment is your apartment?
A Yes; in my name.

Q You leased it in your name alone?
A Yes.
Q And did he pay you some form of rent?
A Yes.
Q And for how long do you think that existed?
A Like, five months he lived.
Q Okay; and finally he left in January of '93?
A Yeah.
Q And he's never been back?
A Yes.

THE COURT: Okay.

MR. GOEMANN: I have nothing else.

MR. SNYDER: May we be excused, Your Honor?

MR. GOEMANN: I have no objection.

MR. HORAN: No objection.

THE COURT: Okay; you're free to go.

MR. SNYDER: Thank you.

(The witness was excused.)

OPEN COURT

MR. GOEMANN: Your Honor, my next witness is Asghar Khan.

Whereupon,

KHAN ASGHAR,

a witness, was called for examination by counsel on behalf of the Defendant, and, having been first duly sworn by the Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Mr. Khan, if you'd please tell the Court your name and spell it, both your first and last?

A Sure, my name is Khan Asghar, spelled K-H-A-N, A-S-G-H-A-R.

Q Which is you first name and which is your last name?

A It's -- Khan is the first name, Asghar is last name.

Q I apologize for messing that up.

A That's all right.

Q Mr. Asghar, do you know my client, Mir Aimal Kasi?

A Yes; I do.

Q Okay; and when did you first meet him?

A It was early part of 1991.

Q And what were you doing? Were you employed at

that time?

A I -- I had my own business.

Q What was that business?

A It was a moving and rental business.

Q Where was that located?

A In Chantilly.

Q That's in Virginia?

A That's in Virginia.

Q In the United States?

A That's correct.

Q What was the name of your business?

A It's Ace Movers and Rentals.

Q I'm sorry, Ace Movers and what?

A Rentals.

Q And rentals. You said you were the owner?

A Yeah.

Q How did you come to meet Mr. Kasi?

A There was Khan, a friend of mine, who I knew since last twenty years or so and he brought Aimal Kasi over to our office out there.

Q All right; and after you met him, Mr. Kasi, did he do any work at all for Ace Movers and Rentals?

A It was not work per se because I was starting

off on that business. I do all rentals and was getting into the moving business. He was -- he -- at that time did not have anyplace to live, so he was afforded a place at the office on the top floor to reside temporarily. And in which course, while he was there, he did help me out a few times.

Q All right; you say he was living above the office?

A That's correct.

Q And where was that -- what was the address of that apartment?

A It's way -- it's Route -- Route 1, Box 277. That should be it.

Q That would be the mailing address for it?

A No; that's the actual address. It's on Route 50, but they call it, I mean, the address was such, it's Route 1, Box 277.

Q All right; that was also in Chantilly?

A Yeah; that's the place where I was working from.

Q Right.

A And that's where he lived too.

Q And approximately how long did he live there?

A I would say two months or thereabouts.
Q And you said that while he was living there he also did sort of some odd jobs for you, is that fair?
A That's correct. We did need moving help off and on and so, we were getting started, he pitched in whenever we asked him to.
Q Do you remember approximately when in 1991 this was, you said early, we're talking winter time or something later than that?
A It was -- I started the business in January so it should be between February and March, April, summer -- summer time.

MR. GOEMANN: That's all I have for the witness, Your Honor.

THE COURT: Cross examination? He may have some questions for you.

CROSS EXAMINATION

BY MR. HORAN:

Q Mr. Asghar, when did he start living above the office?
A Like I said, sir, it's early part of -- I think it was February. I'm just going by approximately, it's like --

Q Approximately?
A Yeah.
Q Early part of February of 1992?
A It would be 1991.
Q February of '91 and he lived above the office until --
A Just a couple of months.
Q And during that period of time he worked odd jobs for you?
A Yeah; whenever we asked him to. He was not employed as such. I mean, he was living up there and he would just, I believe at that time, entered the country so he didn't know anybody else other than Master Chang [ph] and so.
Q And he was not a citizen of the United States at that time?
MR. GOEMANN: Objection, Your Honor. First of all, it's beyond the expertise of this witness. He's incompetent to testify to his status and it would be hearsay.
THE COURT: I sustain the objection unless you can lay a foundation for some knowledge.

BY MR. HORAN:

Q Did you ever discuss with him his legal status in the United States?

A Not really, no.

Q Well, is there some reason -- when he worked for you, did you pay him?

A No; like I said, he just came in to -- like he was helping out because he was living up there and that's -- that's the only –

Q Where did he go when he left you?

MR. GOEMANN: Objection, lack of foundation.

BY MR. HORAN:

Q Do you know? Where did he move when he left you?

THE COURT: I sustain the objection. You have to lay a foundation for the basis of any knowledge that he has of that subject.

BY MR. HORAN:

Q He left you in the summer of 1992?

A Like spring or summer of -- I -- like I said, I don't recollect the exact time frame but like two months later when he moved in then he moved out. And he moved into the vicinity. I don't even know the -- where the

exact address was or anything, that's all. But he did find someplace in Reston, I think that's where he went.

Q So, in the summer of 1992, he would have found someplace in Reston?

A That's --

MR. GOEMANN: Your Honor, I object. He's testified several times that it was 1991.

THE COURT: I sustain the objection.

BY MR. HORAN:

Q So when would it be your recollection that he went to someplace in Reston?

A As soon as he left my premises, that would be like spring 1991.

Q Did he ever work for you after the spring of 1991?

A Not really, no.

Q Did you ever fill out any W-2 forms or anything like that for him?

A No; like I said, he was not employed or he did not work on regular basis. The only time he did work was when he was up there and when we were running short on any help, we asked him if he did pitch in to help.

MR. HORAN: I have no further questions, Your

Honor.

THE COURT: Anything on the re-direct?

MR. GOEMANN: No, Your Honor.

THE COURT: May he be excused?

MR. GOEMANN: Yes, Your Honor.

THE COURT: You're excused and free to go or stay as you wish. Thank you.

THE WITNESS: Thank you very much.

(The witness was excused.)

THE COURT: Next?

MR. GOEMANN: The next witness is Nasir Eshei.

Whereupon,

NASIR ESHEI,

a witness, was called for examination by counsel on behalf of the Defendant, and, having been first duly sworn by the Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Sir, please tell the Court your name and spell your first and last name for the Court Reporter?

A Nasir Eshei, N-A-S-I-R, E-S-H-E-I. Eshei is last name.

Q Mr. Eshei -- Eshei, do you know our client,

Mir Aimal Kasi?

A Yes; I do.

Q And how long have you known him?

A When he came in most probably in '91 sometime, around that period and he was living with his -- my common friend and when I introduced to him.

Q Your common friend, is that Mr. Asghar?

A No; -- Sarfrazi.

Q Excuse me?

A Sarfrazi.

Q Do you know how that's spelled?

A S-A-R-F-R-A-Z-I, I think, sir.

Q All right; so he was living with Mr. Sarfrazi for a time and that's when you met him?

A Yes.

Q And at some point after meeting him, did you and he discuss a business venture together?

A Not -- not then, later on.

Q Well, what was -- did you start a business?

A Yeah; I had a moving company too, at that time.

Q What was it called?

A Budget Moving.

Q And where was Budget Moving located?

A Same address where the Ace Movers were. I use the same address and my home address, both.

Q All right; and were they both in Virginia?

A Both in Virginia.

Q In the United States?

A That's correct.

Q At what point did you and Mr. Kasi discuss a business venture together?

A Actually, I was in the business already but I was renting trucks not owning truck. I nothing on my own. I renting it from Ace Rental U-Haul and when I would need it, I used to use it and then I return it back. So, that's how I was doing it. And then when I met him, he says, if you can buy another truck and then rather paying all the rent, you can pay me instead of that. And that's how we got together.

Q What exactly was the nature of the transaction that occurred as a result of that conversation?

A Basically was -- he was just looking for some income, coming up in that business which can help him out at that time.

Q And what did he do to help you?

A Yeah; he was -- sometime he was with mover, sometime he wasn't but he had more intention of like getting into the business but he wants to know about -- at that time he doesn't know how to get the different like --

Q Did he help you purchase a truck for the business?

A Yeah; he did.

Q Okay; and how did he do that?

A He paid cash money to -- for that.

Q How much did he give you?

A Five thousand dollars.

Q And with that, did you purchase a truck for budget movers?

A No; actually we purchased the truck like on our own name.

Q All right.

A On the company name.

Q What was it to be used for?

A For the same moving -- for moving purpose; yeah.

Q Do you remember approximately when this was that you purchased the truck?

A Most probably mid '91 sometime.

Q May of '91?
A No; mid -- mid '91.
Q Mid 1991.
A Same period when he was moved on to -- to the address in Chantilly.
Q You're saying it's around the time he moved out?
A No; moved in over there. At the same time I purchase the truck.
Q And then once you had purchased the truck together, you said that he wanted to learn -- learn about the business, is that right?
A Learn about the business, how to read a map, how to get to one end to another, because these all new different places, so, you -- you only done with the time. You can't be coming any -- until you -- how to go -- get to point A to point B or you get in one state to another, where to sign --
Q And did he help out with the moving jobs?
A Yes; sometimes.
Q How long was it that he was helping with the moving jobs?
A I didn't get that.

Q About how long did that continue, him helping you?

A Almost for like about a year or so.

Q About a year. And during that entire year, the business was located in Virginia, is that correct?

A Yeah; oh yeah, yeah.

Q In the United States?

A Right -- right, in Virginia.

MR. GOEMANN: I have nothing else, Your Honor.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. HORAN:

Q I understand you to say you had some sort of agreement with him as of --

A It's a verbal agreement, it's nothing that's written.

Q Pardon?

A It's a verbal agreement, nothing like agreement, like --

Q No written agreement?

A No; not written anything.

Q He agreed to give you five thousand so you --

A Yeah; something like that.

Q Something like that?

A Yes; he give me five thousand dollars to go get the truck, so we put the -- the money in -- in account and then he paid the check to the company he bought the truck from.

Q What did he get as a result of the agreement?

A When he do a job, the rental I supposed to pay for renting a truck, give it to him.

Q And did you get anything out of the rental of a truck?

A Of course, I'm going to use it, I can get the money what I'm going to do the job for. So, I get that money and the rental money cost. If he works with me, then he can get that part too. If not, then just get the rental money.

Q Was he an employee of Budget Moving?

A No; he wasn't employee, no.

Q Did he have a work permit?

A I --

MR. GOEMANN: Objection, lack of foundation.

THE COURT: I overrule the objection.

MR. HORAN: If he knows. He's a businessman.

BY MR. HORAN:

Q Did he have a work permit?

A As long I know, he came on a business Visa to America. That's what I know and my knowledge.

Q He had what kind of a Visa?

A Business Visa.

Q A business Visa?

A Yeah; that's -- in my knowledge. I never seen any paper, anything like that, but that was my knowledge.

Q Well, you knew he was not a citizen?

MR. GOEMANN: Objection.

MR. HORAN: This is cross examination, Your Honor.

MR. GOEMANN: Lack of foundation.

THE COURT: I sustain the objection for -- and you'll have to lay the basis of a foundation of how he would know that.

BY MR. HORAN:

Q Do you ever inquire of him of whether or not he was a citizen?

A He wasn't a citizen, I know that much. I don't have to inquire about it.

Q Okay; as far as you knew, he was just here on

a business Visa?

A That much I know; yeah.

Q And he never became an employee of Budget?

A No; he never become an employee of Budget, no.

Q What happened to the truck when he left Budget?

A Later on I sold it.

Q The company sold it or he sold it?

A I sold it -- I sold it because at that time I was in the courier business and the truck was giving me a little troubles and for this it was parking problem other things for which I have to sold it. It was breaking down.

Q Now once you bought the truck, the truck was in Budget's name?

A No; it was in my name.

Q Your name. Well, when you sold the truck, who got the money for it?

A I had the money.

Q During the year that he worked with you, where was he living?

A Where he was living when he was working and I was -- I was know him; first he was living down in Chantilly, the address we -- I told you the Texaco Gas,

next to another property where he was living on top of it -- over the office. And later on he moved to some other Pakistani guy's house. I don't know where he lived and I never visited there. So, I'm not exactly know where was that place was.

Q Well, as of the summer of 1992, he no longer worked with you?

A On and off, if I would maybe need any help and all that. He may be there but I can't exactly recall if he was exactly working with me, but at that time most probably he was working some other jobs.

Q But at the time he left you and didn't stay with Budget, did he still have the business Visa as far as you know?

A No; I -- I -- I don't know that.

MR. HORAN: I have nothing further.

THE COURT: Anything on redirect?

MR. GOEMANN: No; Your Honor.

THE COURT: May he be excused?

MR. GOEMANN: Yes; Your Honor.

THE COURT: You're excused and free to go or stay as you wish, thank you.

(The witness was excused.)

MR. GOEMANN: I call Jeff Frederick, Your Honor.

Whereupon,

JEFF FREDERICK,

a witness, was called for examination by counsel on behalf of the Defendant, and, having been first duly sworn by the Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Mr. Frederick, could you please tell the Court your name and where you're employed?

A My name is Jeffrey G. Frederick, I'm employed with Excel Courier in Sterling, Virginia.

Q How long have you been employed there?

A About nine years.

Q What's your current position?

A Vice President.

Q You were employed there then back in 1993, is that correct?

A That's correct.

Q What was your position in January of 1993?

A Vice President.

Q And while you were vice president in 1993, did

you get to know our client, Mr. Kasi?

A Yes.

Q And how did you first come to know him?

A He was a driver for us.

Q Could you explain to the Court the arrangement that Excel has with its drivers?

A Our courier drivers are independent contractors. They own their own businesses and we contract them to do work for us.

Q Do you remember approximately when it was that you first -- that Mr. Kasi first became associated with Excel?

A I know I turned in a bunch of records that have all those dates on it. It was approximately August of '92.

Q You turned that in to the Court?

A Yes.

MR. GOEMANN: Your Honor, may I approach?

THE COURT: Yes.

THE WITNESS: I was subpoenaed to turn those in.

MR. GOEMANN: All right; I'll have these marked as Defense exhibit. That's exhibit number four for

identification.

(The document referred to below was marked for identification as Defense Exhibit No. 4.)

MR. GOEMANN: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. GOEMANN:

Q Sir, I'm showing you what's been marked as Defense exhibit four for identification.

(Mr. Goemann handed a document to the witness for his examination.)

Could you look through that packet. What is that?

A This is information out of Mir's file and also some information from my computer database that I printed out the other day so that I could answer the questions that you all were asking me.

Q You indicated a moment ago that you didn't recall exactly when Mr. Kasi became associated with Excel. Would referring to those documents refresh your memory?

A Yes; definitely.

Q Okay; could you look through the documents and

then look up when you're done.

(The witness complied with the request.)

A It was the last week in August of '92 is when he started.

Q And what's the process that Excel goes through to enter into a contract with a driver?

A We give them a test. Test their map reading skills, speak to them about how much time they'll be able to give us, go over that they have to drive their own vehicle, go over the fact that they know that it's their own business that they're -- they're getting into. They sign a contract with us and they go out and they run jobs for us and they make a commission off the jobs they run.

Q Is there a certain insurance requirements necessary to be a driver?

A Yes.

Q And what were those insurance requirements in 1993?

A It would be in the contract. It's minimum coverage of a hundred thousand dollars, three hundred thousand dollars of personal liability and a hundred thousand dollars for property damage.

Q And did Mr. Kasi have appropriate insurance to

enter into the contract?

A I believe that is the case; yes.

Q Do you have documentation there indicating he was insured?

A Yes; I do.

Q Is it also required that a driver obtain a driver's license?

A Yes.

Q And would you have entered into a contract with a driver who did not have a valid driver's license?

A Definitely not.

Q Did you enter into a contract with Mr. Kasi?

A Yes; we did and he gave us a copy of his Virginia Driver's License, also a copy of DMV motor vehicles record stating that he had no points on his license.

Q And was -- was a contract between Mr. Kasi and Excel Couriers in effect from the end of August 1992 until January of 1993?

A That's correct.

MR. GOEMANN: I have nothing else, Your Honor.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. HORAN:

Q Mr. Frederick, as I understand it, in August of '92 your company Excel contracted with him as an independent contractor?

A Yes, sir.

Q He was not an employee of your corporation?

A (Shaking head.)

Q Did you withhold any taxes for monies to be paid to him?

A No, sir.

Q Fill out any W-2 forms or anything like that?

A Our contractors get 1099 forms.

Q I notice that there is no work permit for him in the files you provided. Did you make any determination whether or not he had a work permit?

A No, sir.

Q Did you believe him to be a United States citizen?

MR. GOEMANN: Objection relevance, lack of foundation.

MR. HORAN: Your Honor, one of the requirements of the law --

THE COURT: I overrule the objection.

THE WITNESS: If someone gives us a social security number that would -- at that point in time, that would be as far as we would go. We would not go further into checking things out.

BY MR. HORAN:

Q So you never checked his status insofar as immigration was concerned?

A No.

Q He worked for you varying numbers of days each month?

A Yes.

Q Was there no real fixed schedule?

A That's correct, that's -- that's --

Q You would just call him and see if he was available to make a pick up?

A Or he would call us and say, I'm ready to go and -- it's an independent contractor's right to work or not work on a particular day.

Q And then over those months you -- you would bill certain money and then deduct from that certain things and come up ultimately with a check that was to go to him?

A Correct.

Q And I notice on your forms, a lot of the time you would have a -- a deduction of twenty dollars for radio?

A That is correct. We would lease a radio to our independent contracts for the fee of twenty dollars a week.

Q So on all your bills would show on those week ending so and so, the twenty dollars would be for his lease of the radio by which you contacted him and he contacted you?

A Correct.

MR. GOEMANN: Your Honor, I would object to -- if Mr. Horan is referring to the exhibit, I'd ask that he refer to it. If he's referring to some other document that's not before the witness, I'd ask that, if the witness is going to be questioned about it he be showed the document.

THE COURT: Well, I haven't heard the witness have a problem answering a question. And I'm not sure what your objection is.

MR. GOEMANN: Well, Your Honor, Mr. Horan --

MR. HORAN: It's in that stack of documents

they got here. They're the only documents I have.

THE COURT: I overrule the objection. If he -- he can ask him a question from the phonebook if he wants to. If he can't answer it, I guess, see where we go.

BY MR. HORAN:

Q So the twenty dollars would be for that lease purposes?

A That is correct.

Q And sometimes there'd be things in there, six dollars, four dollars, three dollars, miscellaneous. What would that be?

A Occasionally drivers would pick up cash from clients. We would let them keep the cash and we would deduct if from their check. Occasionally there's a five dollar pages. We had an agreement with our contractors that we charge them five dollars a month to have a pager and I can't think of anything else that would be on this one but if we look through it --

Q Would your records show what was the last day he worked with you?

A It was the 23rd of January 1993.

Q And have you ever seen him or talked to him

since the 23rd of January, 1993?

A No; I haven't.

MR. HORAN: I have no further questions, Your Honor.

THE COURT: Any further questions.

MR. GOEMANN: No; Your Honor.

THE COURT: May he be excused?

MR. GOEMANN: Yes; Your Honor.

THE COURT: Okay; you're excused and free to go or stay as you wish, thank you.

(The witness was excused.)

MR. GOEMANN: Your Honor, last week the Court ruled over Defense objection that we had the burden of going forward to show that our client had a connection to the United States for the purposes of our motion. The Court indicated that we would need to present prima facia evidence of that and then once that was done, the burden would shift to the Commonwealth.

The evidence that we have provided, we believe, shows that Mr. Kasi had a -- a substantial connection to the United States. The evidence clearly shows that he was here in 1991, he lived here, worked here and invested in business here, independently contracted

with a business and had a driver's license.

THE COURT: I'm not sure what you're doing now.

MR. GOEMANN: Well, Your Honor, I'm simply arguing that we've made out our prima facia case, that he had a substantial connection.

THE COURT: Well, if you think you have, then I'll see if they have any evidence and if they don't, then we'll see where we go with the argument.

MR. GOEMANN: Very well, Your Honor.

THE COURT: If you're stopping then it's --

MR. GOEMANN: I rest on that evidence, Your Honor.

THE COURT: Okay; do you have any evidence you want to present, Mr. Horan?

MR. HORAN: Yes, Your Honor, I'd call Mr. Campbell.

Whereupon,

THOMAS CAMPBELL,

a witness, was called for examination by counsel on behalf of the Commonwealth, and, having been first duly sworn by the Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q State your full name, please?

A My name is Thomas Campbell, sir.

Q And by whom are you employed?

A I'm a special agent with the immigration service.

Q Are you the custodian of the immigration records of Mir Aimal Kasi?

A Yes, sir; I am.

Q And how do you become the custodian of those records?

A I've been designated by the district director, who is the ultimate custodian, to be the custodian of the records that pertain to Mr. Kasi.

Q Could you tell us whether or not he's a citizen of the United States?

MR. GOEMANN: Objection, Your Honor. If he's

a custodian he might have some records that are relevant to this proceeding but he doesn't have any independent knowledge that --

THE COURT: I sustain the objection. It would have to be on the basis of --

MR. HORAN: Do you have --

THE COURT: Unless he has some independent knowledge.

BY MR. HORAN:

Q Do you have records of -- that show how he entered the United States?

A Yes, sir; I do.

Q And do you have those records with you?

A Yes, sir; I do.

Q Would you get them, please?

(The witness complied with the request.)

Could you show us the document that -- and are those the immigration service records that you have in front of you?

A Yes, sir; these are two copies of the immigration records that I have on Mr. Kasi.

Q And could you show us the document in immigration that indicates his last entry in the United

States?

A I have essentially three documents within two files for Mr. Kasi. I have what is a --

MR. GOEMANN: Your Honor, I would object. There's been authentication of these documents.

THE COURT: I overrule the objection, this is the custodian of the records.

THE WITNESS: I have what is -- what we refer to as a non-immigrant information system inquiry check diagram for Mr. Kasi that indicates he entered the United States as a -- on a tourist or a business Visa in 1991 through New York City.

In addition, I have two other documents that are affidavits submitted on Mr. Kansi or Kasi's behalf that indicate that he illegally entered the United States --

MR. GOEMANN: Objection, Your Honor. Those documents -- there needs to be an adequate foundation of those documents and where they came from and how they're authenticated.

THE COURT: All right; I sustain the objection.

BY MR. HORAN:

Q I'll rephrase the question. What was the date he entered the United States under the tourist or business Visa?

A I have a Mr. Mir Aimal Kansi -- Kasi, excuse me, entering the United States of 2/27/1991, as a -- on a tourist or business Visa and he was authorized to stay in the United States to March 30th, 1991.

This Visa, a non-immigrant Visa, was issued in Karachi on December 4th, 1990.

Q That Visa expired when?

A His admission period expired in March 1991.

MR. GOEMANN: Your Honor, I'm going to object now because if you're going to continue to refer to these records, I would at least like to have the opportunity to see them. Counsel has not seen these records at all.

MR. HORAN: Well, I wonder, would you give us the record that shows what his entry was?

THE COURT: Okay; you can come up and look at it.

BY MR. HORAN:

Q Is that a certified copy of it?

A No, sir; I did not have these certified.

Q But you have looked at the original record and that is a copy of the original record?

A That is correct; yes, sir.

MR. HORAN: Your Honor, I'd ask this be marked as Commonwealth's exhibit number 1 for purposes of this hearing.

(The document referred to above was marked for identification as Commonwealth's Exhibit No. 1.)

BY MR. HORAN:

Q I'm going to show you that document that's now been marked Commonwealth's exhibit number one for identification and ask, can you tell us what that document is?

A This is a computer printout of our -- the immigration services non-immigrant information system. This reflects people that are not citizens or nationals of the United States, entering the United States as a non-immigrant.

In this particular case, this is for --

MR. GOEMANN: Objection, Your Honor. I believe this needs to be shown to be a business record or some other exception to the hearsay rule before he

testifies to its contents.

THE COURT: It has. He is the custodian of the record and I overrule the objection.

MR. GOEMANN: Well, Your Honor, if I may, there's a lot more to the hearsay exception of a business record than simply the custodian being present and saying I'm the custodian and I would object on that basis and if that has not been sufficiently shown, the hearsay exception, I would also object that an exception to the confrontation clause of the Constitution hasn't been proven and therefore this would be a confrontation clause violation.

THE COURT: Your objection is noted.

BY MR. HORAN:

Q Go ahead.

A This reflects a Mir Aimal Kasi entering the United States on 2/27 of 1991. It says that he's a country -- citizenship is Pakistan, the class of admission in this particular case is a B1, which is a tourist or a business Visa to enter the United States through New York City. That he obtained his Visa in Karachi, Pakistan on December 4th, 1990, and gave an address of his intention to go to the United States of hotel Quality Inn, New York.

MR. HORAN: Your Honor, I would offer that into evidence, Commonwealth's exhibit number one.

THE COURT: Any objection other than what you've stated?

MR. GOEMANN: Not other than what I've stated.

THE COURT: Okay; the objection is overruled and the document is received.

(The document previously marked for identification as Commonwealth's Exhibit No. 1 was received in evidence.)

BY MR. HORAN:

Q Now the particular Visa under which he entered, how long under immigration regulations is that Visa good for?

A The Visa itself can be good for a five year period but you are allowed to enter the United States for a specific period of time within that five periods. The longest period of time with this particular Visa would have been a year. In this particular case Mr. Kansi or Kasi was admitted into the United States until, I believe, March 30th, 1991, about a thirty day period.

Q Now, do the records reflect any other entry in

the United States by Mr. Kasi other than that entry?

A Yes, sir; I have two other files for Mr. Kansi or Kasi, as we know him now. One is a file for political asylum. Within this file Mr. Kasi presides -- provides a Pakistani passport that was issued for --

MR. GOEMANN: Your Honor, I make the same objection that these are not properly authenticated. They don't come within any hearsay exception and if he's going to start testifying about things that come from other countries, I don't believe he has laid it out -- there's been an adequate foundation laid that he can properly authenticate those documents.

THE COURT: I overrule the objection but if you want to look at the documents you may.

MR. GOEMANN: I certainly do.

(The witness handed a document to Mr. Goemann for his examination and conferred with him.)

THE COURT: Would you testify for the record what you're telling him?

THE WITNESS: Oh, I'm sorry, sir.

THE COURT: I don't know what you're saying.

THE WITNESS: I was basically explaining these records for him so he'd have some sort of idea what he's

looking at.

THE COURT: Well, explain it.

THE WITNESS: Certainly, within this file there are some computer screen printouts that reflect Mr. Kansi's application status for political asylum. He --

MR. GOEMANN: Your Honor, in fairness, I would like to have the opportunity to view the documents without his testifying --

THE COURT: Okay; you don't want his -- his information?

MR. GOEMANN: Not at this point, Your Honor.

THE COURT: All right; then just let him look at the documents and don't say anything about them.

(Pause.)

MR. GOEMANN: So this is also an amnesty file that pertains to Mr. Kasi.

MR. HORAN: Let's just stick with this file for a moment.

THE COURT: And your question, Mr. Horan?

BY MR. HORAN:

Q Mr. Campbell, do those records reflect any re-entry into the United States by this, Mr. Kasi, any time after the entry in 1991?

A In this asylum file; no, sir. Mr. Kasi has re-entered the United States, and he's permanently been paroled by the immigration service.

Q As of January of 1993, had he come back in the United States at all from the original entry of January of '91 until January of '93?

A Not to my knowledge, sir.

Q Well, would your records reflect that if he had re-entered the United States at any time from January of '91 until January 25 of 1993?

A Yes, sir.

Q And you don't find any entry?

A No, sir.

Q Can you tell from examining those records what his legal status was in the United States as of January 25th of 1993?

MR. GOEMANN: Your Honor, I'd object. I don't know that this witness -- I object that this witness does not have the -- there's no foundation laid for that question. That's a legal determination. There's no foundation for this witness having a legal expertise or the knowledge to make that legal determination.

THE COURT: I sustain the objection of asking

him what he can determine. If the records have a reflection, he may testify what the records show.

BY MR. HORAN:

Q Did he apply for United States citizenship anytime prior to January 25, 1993?

A No, sir; he would have been ineligible to apply. He -- he had no lawful status in the United States.

MR. GOEMANN: Objection, Your Honor. It's non-responsive and he's not testifying about what the records -- he seems to be testifying about his opinion.

THE COURT: I sustain the objection.

MR. HORAN: Your Honor, if it's not in there, if the records -- an application for citizenship would be in the records and there is not in the records. You are -- you are forced to prove a negative. It's not there. If he had applied, it would be there.

THE COURT: Well, I understand and the fact that it isn't there, he has said, it's all the other stuff he added on there that I'm sustaining the objection to.

MR. HORAN: Well, as long as Your Honor heard him say it wasn't there, I have no further questions.

THE COURT: I sustain the objection to the

additions to the -- there is no application for a citizenship there.

MR. GOEMANN: Your Honor, I would ask for brief adjournment at this time. As the Court knows, we made a four year request to the INS quite a long time ago and were told that the original file could not be found by them in response to our request.

I would like to go get the documents for possible use in cross examination of this witness concerning these documents.

THE COURT: You'd like to go get what documents?

MR. GOEMANN: The documents that we received from the INS indicating that they couldn't find the file. A file which apparently has now reappeared.

THE COURT: And you have something in your office or something?

MR. GOEMANN: Yes, Your Honor.

THE COURT: We'll break until two o'clock, break for lunch. We have to break in a few minutes anyway.

* * * * * * * * * * *

136

(Whereupon, at approximately 12:49 o'clock p.m., the hearing in the above-entitled matter was recessed, to reconvene at approximately 2:00 o'clock p.m.)

* * * * * * * * * * *

AFTERNOON SESSION

(The hearing in the above-entitled matter was reconvened at approximately 2:00 o'clock p.m.)

(The Defendant entered the Courtroom.)

THE COURT: Let's see, we had a witness on the stand, is he here? Mr. Campbell. Do you know what happened to him, Mr. Horan?

MR. HORAN: I saw him at the elevator when I was coming up.

THE COURT: Was that on this floor or a lower floor?

MR. HORAN: It was down at the bottom.

THE COURT: Sometimes the elevators are -- are a problem.

MR. HORAN: Your Honor, when I got it was full. There were a bunch of people waiting for the next.

THE COURT: That's probably the problem.

(The witness resumed the stand.)

CROSS EXAMINATION

BY MR. GOEMANN:

Q Mr. Campbell.

A Yes, sir.

Q The records that you've been referring to, how

long have they been in your custody?

A How long have they been in my custody?

Q Yeah; as custodian of the records?

A Whenever this memo was, made me the custodian of the record, the copies of these files were -- they -- I don't want to say I'm in the custody of them. I mean, the copies I have with me today are the copies I made of Mr. Kansi's file just after the incident.

Q So that's back in 1993?

A Yes.

Q You made -- so the last time you saw -- is that the last time you saw the originals of the file?

A The original records were transferred out of my office about two or three days after the incident.

Q Now prior to them being transferred out of your office, did you compile the records?

A Did I compile them?

Q Yeah.

A No, sir; I pulled in the two files, reviewed them and made copies of them.

Q Do you know when then documents that became parts of that file were made?

A The days that they were dated and submitted to

the INS, as in like the applications -- I'm not sure what you're asking --

Q Well, the documents that are made are not made in your office, are they, the ones in that file?

A These -- the two files are two applications for two INS benefits. The files weren't completed by INS --

Q What office do you work out of?

A I work in the investigation section, sir.

Q Okay; and the applications that you're talking about are not made to the investigation section, is that correct?

A No, sir.

Q Okay; you said one is an application and you talked about it for asylum, is that correct?

A That's correct.

Q Where is that application made?

A It would be filed with the Washington district office, political asylum branch.

THE COURT: Can I ask a question. I'm not sure what we're doing. I guess I lost the bubble during lunch. Were you through?

MR. HORAN: Yes; I was finished, Your Honor.

THE COURT: Oh, okay; so you're question -- we're on cross examination, is that where we are?

MR. GOEMANN: That's where I am, Your Honor.

THE COURT: Okay; well, I wasn't there yet. I hadn't written down cross here yet, so I didn't realize we'd -- what we were doing. Now I'm with you.

BY MR. GOEMANN:

Q You said it would -- the application would have been made at he Washington District -- what was the name of the office?

A The political asylum application would have been filed at the political asylum branch. The amnesty application would have been filed with the office that was adjudicating amnesty applications at that time.

Q Okay; but this morning you testified specifically about the records from the asylum application, is that correct?

A I believe I mentioned them both but we went into depth about political asylum request.

Q And the amnesty office is not the office that you work from, is that correct?

A No, sir.

Q How did the records come to be in the custody

of your office?

A After the incident, I requested the file and had it sent over to my office.

Q Do you take part in the keeping of the records while they are in the amnesty office?

A No, sir.

Q So you don't directly keep those records at all, is that correct?

A No, sir.

Q You don't have any dealings with them at all prior to your sending for them, is that true?

A That's correct; yes.

Q And it's only after you send them that they become part of your records, is that right?

A After I send them where?

Q After you send for them, that's when they become in your custody?

A That's correct; yes, sir.

Q And you know what happens to them once they reach your custody, is that fair to say?

A Yes, sir.

Q How long were these records in your custody before they were sent away somewhere?

A A few days.
Q And after they were sent away, you don't know what happened to them after that, the originals?
A Haven't the slightest clue, sir.
Q So the only thing that you've really had in your custody for any length of time are these copies, is that correct?
A That's correct; yes. I mean, I had the original files at one point.
Q For a few days?
A Yes, sir.
Q And they were kept in your custody only pursuant to your investigation, is that true?
A Yes, sir.
Q Prior to coming to Court, did you undertake any kind of investigation to find the originals of these files?
A I believe in response to your FOIA request, my entire office searched every crook and cranny to find the files. So, it's been a pretty exhaustive search for the file.
Q And those originals could not be found?
A We don't have them, sir.

Q Now, are you familiar with an employee named Suzanne Plasaneka [ph]?

A Yes, sir; I knew her. I believe she's our FOIA officer.

Q All right; so she works in the same office or in some way connected with your office, is that true?

A She's the district FOIA officer.

THE WITNESS: I have a question, Your Honor. I've been provided with a letter from our District Counsel, that limits of the scope of my testimony and I think this is outside of that. Before I go much farther, can I have somebody say, hey, I can testify about this.

THE COURT: Well, I don't know what the next question is, so I guess we'll see what -- I'm not sure what any of this has to do with the motions today. But --

MR. GOEMANN: Well, Your Honor, it has to do with the integrity of the records that this office -- this gentleman relied on in his testimony.

THE COURT: Well, my notes from this morning and again, I've had lunch since and a frontal lobotomy or whatever, but my notes were that he didn't testify anything from the amnesty record nor from the -- what's the other word?

MR. HORAN: Asylum.

MR. GOEMANN: Asylum.

THE COURT: Asylum record. When he started to get into those, you objected or something happened and Mr. Horan said that's not what I'm talking about and then just said, did the records show that he ever re -- the question was, are there any other entries into the country.

And I -- apparently the witness interpreted it as entries in the record and started talking about these other two records, of which I haven't heard anything yet.

MR. GOEMANN: But, Your Honor, I --

THE COURT: It's not part of the case.

MR. GOEMANN: I'm sorry. My memory was that when the witness started talking about the amnesty record, Mr. Horan cut him off but that the remainder of his responses were made with reference to the asylum record.

THE COURT: I thought there were three files? Are there three files or two files?

THE WITNESS: There's two files.

THE COURT: Two files, asylum and amnesty.

THE WITNESS: Correct.

THE COURT: Okay; then I'm wrong again. Go ahead. I'm still not sure what it has to do with the

case, but go ahead.

MR. GOEMANN: Thank you. Your Honor, I'd like to have this marked.

(The document referred to above was marked for identification as Defense Exhibit No. 5.)

MR. GOEMANN: I'd show the Commonwealth what's been mark as Defense exhibit five for identification.

(Mr. Goemann hands a document to Mr. Horan for his examination.)

MR. HORAN: I don't know how it's relevant. It's -- I object on the grounds of relevance. It's their response to his FOIA request.

THE COURT: Well, I don't know yet, so, go ahead.

BY MR. GOEMANN:

Q Sir, I'd like to show you what's been marked as Defense exhibit five for identification.

(Mr. Goemann handed a document to the witness for his examination.)

Do you recognize the letterhead?

A Yes, sir; it says Immigration Naturalization Service.

Q And the FOIA officer signed at the bottom, do you recognize that?

A Right.

MR. HORAN: I object, he can't testify to the records of some other office, whether they're authentic.

MR. GOEMANN: Your Honor, I can ask if he recognizes the signature.

THE COURT: I overrule that objection.

THE WITNESS: I know Suzanne, I've never seen her signature.

BY MR. GOEMANN:

Q Okay; so you don't recognize that signature one way or another?

A No, sir.

Q Is there any other means by which you could recognize this document as coming from the INS?

A Aside from someone typing our name on it, that's it, sir.

Q All right.

A I --

Q Sir, at this point --

MR. GOEMANN: Well, Your Honor, at this point I would renew my objection to any testimony of this

witness based on the records. They clearly were not business records kept by this custodian and I believe the testimony on cross examination shows that.

Moreover, the originals of these documents cannot be found. There's no indicia of reliability concerning these copies of these records. They're not certified in any way. The originals are not producible and, in fact, this witness testified that -- they scoured the office for the originals and couldn't find them.

The originals, according to this testimony, were kept in an entirely different office and this witness does not know anything about how they were kept or the manner in which they were gathered or the system by which they were kept to show that they were kept in the normal course of business.

The only thing this witness can testify to is that during several days, pursuant to a specific investigative request by this witness, he received them and they were in his custody for a few days.

That is not sufficient to satisfy a business records exception or any other exception to the hearsay rule. And based on this additional information brought out on cross examination, I would renew my objection to

any of the evidence coming in, either -- based on -- both based on hearsay and based on confrontation clause because we are being denied the right to confront the documents and there is no showing of the reliability of these documents based on this testimony.

So I would once again object to it and ask that any testimony based on this witness's reading of those documents be stricken.

THE COURT: I overrule the objection. He testified that he was designated as the custodian of the records. He had the original records and these are copies of the original records so you have them right there. So that objection is overruled.

BY MR. GOEMANN:

Q Sir, in the records regarding the application for asylum, you testified that there was nothing in that file showing that he had re-entered the country, is that correct, after an entry in 1991?

A The file indicates how he entered the United States, was how he claims to have entered the United States.

Q All right; and there's nothing in there -- there's nothing in that file to show that he entered again

after that, is that correct?

A No, sir.

Q There's nothing to show that he left after that until 1993, is that correct?

A I have no record of Mr. Kansi or Mr. Kasi leaving the United States.

Q And the record also does show that a work permit was issued to Mr. Kasi sometime between 1991 and 1993, isn't that correct?

A I believe that was based on his claim for amnesty and his adjustment to gain lawful status.

Q All right; so, there was a valid work permit issued by INS during that time period, is that correct?

A Yes, sir.

MR. GOEMANN: Nothing else, Your Honor.

THE COURT: Anything else?

MR. HORAN: Nothing.

THE COURT: May he be excused?

MR. HORAN: He may, Your Honor.

THE COURT: Okay; you're excused and free to go or stay as you wish. Thank you.

(The witness was excused.)

THE COURT: Any further evidence from your

side?

MR. HORAN: That's it, Your Honor.

THE COURT: Okay; anything -- further evidence, rebuttal evidence?

MR. GOEMANN: Your Honor, we're just dealing -- I just want to be clear. We dealing only with the issue at this point of whether Mr. Kasi has a sufficient connection to the United States to fall within the rule of Verdugo-Urquidez. On that issue I have no further evidence.

THE COURT: I thought we were dealing with the whole motion and this was a portion of that.

MR. GOEMANN: Well, Your Honor, I have -- I believe I have shouldered the burden that we have at this point to show that the fourth amendment protection should apply to Mr. Kasi.

THE COURT: And that it's been violated. Is that --

MR. GOEMANN: No, Your Honor; I don't believe I have the burden to show the violation. I believe the Court last week ruled that the Defendant had the burden to show the substantial connection to the United States.

THE COURT: Oh, okay; so, you want a ruling on

that at this point.

MR. GOEMANN: Well, I don't have any further evidence on that point. If the Court wishes Mr. Horan now to go forward with his burden, I don't object to that. But I don't have any further evidence on that point.

THE COURT: Okay; I'll hear your argument why you think you've met that burden.

MR. GOEMANN: Your Honor, first of all to be clear and to simplify matters, the case -- the case law does not require in order for Mr. Kasi to fall within the protections of the fourth amendment that he be a citizen of the United States. Verdugo-Urquidez clearly says that the person has to be a class of persons who have developed a sufficient connection with this country to be part of the national community.

And one need not be a citizen, in fact, in Verdugo-Urquidez, they -- the Court specifically refers back to an earlier case, INS versus Lopez Mendoza at 468 United States 1032, a 1984 case.

In that case the -- the Defendants were illegal aliens and that was clear from the record. And the Court, in commenting on that case said, even assuming such aliens would be entitled for fourth amendment

protections, their situation is different from Respondent's. Respondent being Verdugo-Urquidez.

The illegal aliens in Lopez Mendoza were in the United States voluntarily and presumably had accepted some societal obligations. So that language, Your Honor, I believe gives us at least some parameters for making a decision here. There must be a voluntarily -- voluntary residency in the United States or entry and residency in the United States and the acceptance of some societal obligations. Enough at least for clearly illegal immigrants to have taken on.

Your Honor, there is no evidence that Mr. Kasi was an illegal immigrant at all to begin with. The only evidence the Court has is that he entered the United States in 1991. Once here, he moved -- he lived in Virginia, he lived in Chantilly and worked odd jobs for a while before meeting up with Mr. Eshei.

Once he met up with Mr. Eshei, the evidence is that he actually invested in a business in the United States. He gave Mr. Eshei five thousand dollars for their moving business and with that they bought capital, they bought a truck. And Mr. Eshei testified that Mr. Kasi wanted to get to know the business, learn his way around

Virginia and clearly Mr. Kasi was showing a -- an intent to become part of the people of the United States at that point. He was actually investing in a business here.

Moreover, the evidence is that in 1993, he was first of all still living in Virginia. Mr. Mir testified that he lived with him as a roommate from August of 1992 to January of 1993 and then there was also testimony that Mr. Kasi was contracted with Excel Contract – Excel Couriers to be an independent contractor with that company.

For that they required a driver's license, they required insurance and they required a social security number. And each of those things Mr. Kasi had and each of those things additionally shows his connection to the United States and to -- well, specifically Virginia but even more generally to the United States.

Moreover, we just have the time period. We have from January of 1991 to January of 1993, two years. In the cases like Verdugo-Urquidez -- in that case, of course, the Defendant had no connection to the United States. There was no evidence that he had ever been here except for the fact that he had been brought here by -- by federal agents. And the Court in that case said, well,

that's not -- that's not enough. Simply bringing someone here and then bringing -- being brought to trial is not enough.

But Lopez Mendoza, I think, clearly indicates and the Court in Verdugo-Urquiez's comment on it shows that it really doesn't take all that much. Mr. Kasi clearly has far more -- far more than any of -- than that he came here voluntarily and presumably accepted some societal obligations. We have a driver's license, we have a social security number, we have driving insurance, we have investing in a company here, we have his -- his working with a company before that, Ace Movers, the testimony was that he did not work regularly with them but that he did some work for them, and then his work for the courier service.

He was living here and I think the evidence shows that he was living here fairly consistently. I mean, there -- there's no evidence that he ever left during that time period and, in fact, the testimony of the INS agent shows that he -- that there's no evidence that he left. And the evidence is that he had a valid work permit during that time period.

So he, in essence, used -- utilized the

processes of the government -- the United States government, which again shows a voluntary acceptance of the obligations of this society.

He did not sneak across the border. He came in, filled out papers and went through a process and the testimony was that he had applied for political asylum. He applied for a work permit and was granted one.

All of these things, Your Honor, show that he is accepting societal obligations and making a connection with the United States.

There is no case law directly on point as to how much is required. The only case I was able to find on the subject, said basically, even assuming that he's shown, these contacts -- they don't decide it one way or other. They just say, even assuming it, we find that under the fourth amendment, that the claim must fail. But they don't decide this and I haven't been able to find any case law that really fleshes out the parameters of what this language means. I suppose it's because the case is so recent, Verdugo-Urquidez, a 1990 case.

There hasn't been any case law that I've been able to find to show what the parameters of this -- but whatever they are, I think Mr. Kasi has clearly shown

during that two year period that he took on sufficient responsibility in this country and made sufficient connections to the government to meet the standard of Verdugo-Urquidez and I would ask that the Court so find.

THE COURT: Mr. Horan?

MR. HORAN: Your Honor, the issue is whether or not on a -- an alien -- that alien accumulates, while here, some constitutional rights that he carries with him when he goes abroad. That was answered resoundingly, no, in the United States versus Verdugo-Urquidez. Answered by the United States Supreme Court when they said, the available historical data show, therefore, that the purpose of the fourth amendment was to protect the people of the United States against arbitrary action by their own government.

It was never suggested that the provision was intended to restrain the actions of the federal government against aliens outside the United States. That's found in 494 United States at page 267.

The case they cited the other day, Barona out of the 9th Circuit, really puts it in pretty good context. The only reason we're here even talking about it is because the fourth amendment by its terms only applies to

the people.

You have to find out who the people are. And it is clear that there may be some reasons why you become part of the people for purposes of the fourth amendment while you are within this country. That's a totally separate question of whether or not somebody could come here on a student or business Visa, remain here for two years and then leave and go to Tibet to remain for the rest of their natural lives.

And does the fourth amendment of the American Constitution travel with them to Tibet? That's really what they want here. They want to say that that constitutional provision is over there with them. Now, Barona, which they cited the other day says this, the term People of the United States includes, quote, American citizens at home and abroad and lawful resident aliens within the boarders of the United States who are victims of actions taken in, and they italicize, in the United States by American officials. Do you know a case they're citing? The are citing the opinion in Verdugo-Urquidez when it was in the 9th Circuit, a case that was later reversed by the United States Supreme Court.

They want a point out of page 1094, in Barona,

for the record is 56 Federal 3d 1087, page 1094 it says this, it is yet to be decided, however, whether a resident alien has undertaken sufficient obligations of citizenship or otherwise develop sufficient connection with this country to be considered one of the people of the United States, even when he or she steps outside the territorial borders of the United States.

Barona says that's yet to be decided. I would suggest to the Court that -- that the Barona court, the 9th Circuit Court that was reversed by the United States Supreme Court in Verdugo, misreads Verdugo.

The United States Supreme Court specifically use in the language, resident aliens outside the borders, says the fourth amendment doesn't apply. In all the conversation about whether or not they are the people, for purposes of the fourth amendment, misses the point.

They may be part of the people when they're within our borders but they certainly aren't the people for purpose of the fourth amendment when they go to foreign land.

We would otherwise really have the -- the rather unbelievable constitutional result that if you once lived here, buy a truck for five thousand dollars and stay

around for two years, you would then for purposes -- seemingly, if the right is there, seemingly until your old age, you would be wrapped with the fourth amendment of the American Constitution.

And I submit to the United States -- I submit to this Court, the United States Supreme Court at least mentioned it in Verdugo, if there was any possibility that was true, they do not. They close out the extra territorial power of the fourth amendment and that's what we're talking about here, Your Honor. We ask you to deny the motion.

MR. GOEMANN: Your Honor, Verdugo clearly does not deal with this situation, so there was no reason for them to address what happens when someone comes to the United States and then leaves. So, I don't think the Court could look to Verdugo-Urquidez to solve this problem. It's plainly one of those kinds of issues that they left for the Courts to decide after that. It was just not necessary.

In Barano, [sic] Mr. Horan cites language of the case that was overruled eventually and I'm -- quite frankly, I'm not sure I understand why he's citing this -- this bad law from Barona but apparently -- it's just not

applicable.

Verdugo-Urquidez was dealing with somebody who had not been in the United States period. There's no evidence of the contrary.

And the two issues there are, does the fourth amendment apply to the place and then does it apply to the person. And here the fourth amendment we argued last time and I think the Court, at least impliedly ruled, that the fourth amendment would apply when the FBI went to another country and seized Mr. Kansi.

Quite frankly, I don't know that it is terribly absurd to think that the fourth amendment applies when federal agents go and seize someone who has lived here for a year -- for several years and made connections with this county. I don't know that -- I don't understand why that's -- why that's an absurd proposition.

We're not talking about the fourth amendment simply applying in the abstract, we're talking about it applying when federal agents go and seize somebody and bring him back to the United States.

And when that person is someone who developed the substantial connections that are required by Verdguo [sic]- Urquidez, then the fourth amendment applies and to say

that -- to try to reduce this to sort of an absurd scenario, I think really misses the point.

If someone has been here for several years then the fourth amendment does apply to them and Reed versus Covert, clearly says that, the fourth amendment is not bound by the borders of the United States. If it applies to you here, then when you go across to another country, the fourth amendment applies to you. And that's what Reed was all about.

So there's no -- it doesn't -- the protections that you have here don't stop at the border and I don't think any of this case law can be read to indicate that. And I would ask that the Court find that we did meet our burden here. I'll stop at that.

THE COURT: I find that the fourth amendment does not apply to Mr. Kasi's, we'll call it arrest. I don't know whether I'm using the right word or not but let's call it that, in Pakistan, but we're in a foreign country by the FBI. The Defendant's evidence shows that he is not one of the people to whom the fourth amendment applies.

He was last in this country four and a half years before the event that I'm calling the arrest. He's

not a U.S. citizen. There's no evidence he had any contact with the United States in the intervening period of time and the arrest occurred in a foreign country. And under those facts, he is not entitled to the protection.

Now, on the -- it's always possible that I'm wrong about that and if you want to present evidence or argue the point that -- I mean the evidence was presented, I take it, at least in part by Agent Garrett last week. If you want to argue the point of whether the fourth amendment, if it applied, was violated or not, you may in order to give the Appellate Court the chance to say, well, you're wrong about that but it does or doesn't apply.

MR. HORAN: Well, Your Honor, it is very hard from reading the United States Supreme Court cases to find out just what sort of connection they're talking about.

THE COURT: No; I'm not talking about connection. I'm talking about assuming that I'm -- I said it didn't apply. Assuming I'm wrong about that, then some Court needs to decide whether the fourth amendment was, in fact, violated or not.

MR. HORAN: Well, I --

THE COURT: If they -- if they wanted to say that it did apply. So, I'm offering you an opportunity,

if you want it, to present further evidence or to argue the point or not. Because if you don't, then they can say, well it -- it does apply and they can come back or whatever.

MR. HORAN: Well, certainly under United States law, Agent Garrett of the Federal Bureau of Investigation had the right under our law to arrest a felon who had fled from this country. He had probable cause to do so under our law and he had an unlawful flight to avoid prosecution warrant that he was aware of. Of course, he couldn't serve in the foreign country because it doesn't have legal validity in that foreign country.

But certainly under our American law he, a, had probable cause to make the arrest; and, b, once he had that probable cause to make the arrest he could seize him as a citizen matter. He could make a citizen arrest. He doesn't have to call it that but he's got the legal right to make that citizen arrest. He could make it in Canada. He could make it in Mexico. It doesn't effect the validity of the act that he's performing. It just deals with the whole question of acting outside the territorial jurisdiction that he has.

Counsel uses the term, abduction. I would

submit to the Court that the evidence here is not one of abduction. This police officer could not, under American law, be abducting this Defendant at the time he's placing him under arrest. He had a right to under our law. And if he didn't have the power, the territorial power in the location where he was found, he certainly had the legal power to arrest him at that time.

In fact, he not only had the legal power under his duty as a federal agent and being aware of that warrant, he had to contain him if he could and that's what he did.

So the notion of if we've got an abduction here, it's just not true. The question is, what does he do once he gets him and of the evidence before Your Honor, he attempted to get him back to the United States where he's back in this jurisdiction and he had a right to do that also.

THE COURT: Okay; do you want to say anything?

MR. GOEMANN: Well, Your Honor, I'm not sure what evidence Mr. Horan is referring to. I mean, the evidence in this case --

THE COURT: The evidence of Agent -- the evidence of Agent Garrett is what he's relying on.

MR. GOEMANN: Well, I -- this might be overly technical but I don't think any of that is evidence in this -- in this motions hearing. The only evidence in this motions hearing is that which I presented from my three witnesses and the evidence of the --

THE COURT: I received the evidence of Agent Garrett in this motion as well. If you want to -- if you want to present something else, you may.

MR. GOEMANN: Court's indulgence.

THE COURT: Or you can ignore the whole thing and rely on the Appellate Court to rescue you, if you want to.

MR. GOEMANN: Your Honor, I'll argue based only on that evidence at this point.

Your Honor, the testimony I recall from Agent Garrett is that, first of all, he did not have any authority to make arrest based on any document that he had from the United States or any document in Pakistan.

And indeed, from -- there was no warrant of any kind executed on my client in Pakistan.

And I don't think there was any testimony about that and, in fact, I think that the stipulation was that there was no paper or document that could have served

as a basis for an arrest from Pakistan and there was no evidence presented that was any document that was the basis for an arrest outside of the United States and, in fact, outside of Virginia that could lawfully be used to effectuate an arrest.

So first of all, I -- I don't think the evidence supports this having been an arrest at all. What happened, and I believe Agent Garrett testified, was that he was over there to seize Mr. Kasi and turn him over to Pakistani authorities. That's not an arrest under United States standards. It's a seizure under the fourth amendment I submit, but it is not an arrest. And he explicitly said, he was there to seize this person. I'm not sure that he necessarily used the word seize, but find him and turn him over to Pakistani authorities.

And, in fact, that's what he did. He seized him and turned him over to Pakistani authorities and then sat and watched him for two days in a cell somewhere, in some building, somewhere in a foreign country. That is certainly a seizure within the fourth amendment and Mr. Kasi was -- and then, of course, after the two days, someone calls up and says, okay, he's good to go. And they cart him off to the United States.

There is no evidence of a warrant from Pakistan being executed. There's no evidence of a warrant from the United States being executed. It's basically a warrantless seizure. And I use the term abduction, if Mr. Horan doesn't like that, I submit he can find one. But arrest isn't the word.

The question then becomes, was this a reasonable seizure under the fourth amendment. And we have heard absolutely no evidence as to the necessity or the reasonableness of this conduct.

There is evidence in the record that there was an extradition treaty between the United States and Pakistan. The Court found this morning that Mr. Kasi does not have any right to have a -- does not have any direct rights to enforce the treaty.

However, the fact that a lawful process existed to bring Mr. Kasi back to the United States is evidence that the -- that a lawless method of bringing him back to the United States is unreasonable and that the government should have the burden of showing that the steps that they took were reasonable. That is was reasonable for them not to utilize this law.

There are other instances, Your Honor, where

-- Court's indulgence.

Other instances where other standards are utilized in determining whether something was reasonable or not under the fourth amendment. The manner in which someone is being seized. There's the knock and announce rule, a rule -- a common law rule that the Court looks to, to determine a reasonableness of the fashion of a seizure.

There are rules outside of the fourth amendment directly which inform a -- the Court's choice, excuse me, the Court's analysis of whether a search was reasonable. Is an inventory search being done according to department regulations. Is a roadblock being done according to specific regulations. So, there's certainly precedent for looking outside of the fourth amendment to determine the reasonableness of police conduct. And that's what we have here, Your Honor.

We have police conduct that, at least on a prima facia level, violates a law which is created to explicitly for the purpose of retrieving persons wanted in the United States from another country. Here the evidence is clear that they did not utilize that law. There's no evidence that they utilized any other legal process and the evidence is that there was no arrest made in Pakistan

pursuant to any kind of legal process.

And for all those reasons, Your Honor, the Commonwealth has not shown that the manner of this seizure was reasonable and therefore had the Court ruled that the fourth amendment applied to Mr. Kasi, we would ask that the Court suppress the evidence because the manner of the seizure was unreasonable.

THE COURT: I think that the argument points up why you just can't apply the fourth amendment to a foreign national seized, I'll use your word seized. I think my word arrest is not the right word, with all of the other baggage that it carries, why you can't apply the fourth amendment to a seizure in a foreign country of a foreign national.

Mr. -- I think Mr. Horan stipulated that the FBI didn't have any jurisdiction there. So it is like a citizen doing this and the citizen seized Mr. Kasi, turned him over to a foreign country, later was -- received him back and brought him back here. And it is simply not within any fourth amendment idea. It's reasonable but not if you -- not if you're going to require that they have some kind of jurisdiction in the foreign country, because they don't.

So I think it's a circular argument and I wasn't as successful in getting to a point where I could make it clear for an Appellate Court as I had hoped, because you -- I'm chasing my tail. It -- the fourth amendment simply doesn't apply. But you have other motions.

MR. GOEMANN: Yes, Your Honor.

THE COURT: Okay.

MR. ROMANO: I think we're at a point where again, we say the fifth amendment applies and Mr. Horan says, no it doesn't.

THE COURT: Let's see, now which --

MR. ROMANO: Motion to Suppress the statement allegedly made to a Sheriff's deputy.

THE COURT: Okay.

MR. ROMANO: Your Honor, we've been apprised of the fact by Mr. Horan that supposedly there was a statement made by Mr. Kasi to a Sheriff's deputy on July 24th. We'd move to suppress it as violating the fifth amendment.

If the Commonwealth -- our position is that the Commonwealth intends to introduce this statement. They have to prove that it is constitutionally valid.

APPENDIX Z

VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINAI :

v. : Docket No. K79148

MIR AIMAL KANSI :

Defendant. :

MOTION TO SUPPRESS EVIDENCE

Defendant, Mir Aimal Kansi, through counsel, respectfully moves this Court to suppress as evidence against him any statements, objects or information gathered as a result of his seizure in this case as having been obtained in violation of the fourth amendment to the United States Constitution and Article 1, Section 10 of the Virginia Constitution. In support of this motion, counsel states:

1. Some time at the beginning of June 1997, the defendant, Mir Aimal Kansi, was abducted from Pakistan by police forces of the United States acing pursuant to a capias issued by the Circuit Court of Fairfax County. The abduction was a seizure under the United States and Virginia Constitutions.
2. At the time of the abduction, an extradition treaty existed between the United States and Pakistan which described the procedures required when one country requested that the other country deliver up a person accused of a crime in one jurisdiction who is found within the territory of the other jurisdiction. Such was the case here where Mr.

Kansi, accused of a crime in the United States was found within the territory of Pakistan. In addition, both countries have enacted statutes which create procedures to carry out extradition requests.

3. The abduction – seizure of Mr. Kansi was accomplished in violation of the Extradition Treaty between the United States and Pakistan and without invoking the procedures set out by the laws of each country. The manner in which the seizure was made was therefore illegal and unreasonable and violated the United States and Virginia Constitutions.

4. Because the manner in which Mr. Kansi was seized was unconstitutional, any evidence secured as a result of the seizure must be suppressed.

WHEREFORE, for the foregoing reasons, and any further reasons which may appear to the Court following a hearing in this matter, the Defendant respectfully requests that his motion be GRANTED.

Respectfully submitted,
MIR AIMAL KANSI
By Counsel

S/_____

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VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINAI :

v. : Docket No. K79148

MIR AIMAL KANSI :

Defendant. :

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Whether the Fourth Amendment requirement that seizures be reasonable is satisfied in a particular case "depends on not only when a seizure is made, but also how it is carried out. Tennessee v. Garner, 471 U.S. 1, 8 (1985). See also Graham v. Connor, 490 U.S. 386, 394-95 (1989). Garner and Graham make clear that when analyzing a Fourth Amendment claim, a court must analyze the reasonableness of the manner by which a seizure was made. While these cases arose in the context of civil lawsuits alleging Fourth Amendment violations, the analysis is the same no matter the context. See Garner, 471 U.S. at 8-9 (citing to criminal cases in support of the Court's analysis).

If the manner of seizure was unreasonable, any evidence secured by the seizure must be suppressed. In Schmerber v. California, 384 U.S. 757 (1966), the appellant claimed that the manner in which the police seized blood from his person was unreasonable in violation of the Fourth Amendment and should therefore be suppressed. The Court found that "the Fourth Amendment's proper function is to constrain...against intrusions...which are made in an improper manner." Schmerber,

384 U.S. at 768. The Court proceeded to analyze whether "the means and procedures employed in taking [appellant's] blood respected relevant Fourth Amendment standards of reasonableness." Id. Ultimately the motion to suppress was denied because the record showed that the test was performed in a reasonable manner. Id. at 771. Thus, if police seized the defendant in an unreasonable manner, the seizure would have violated the fourth amendment and any evidence resulting from the seizure must be suppressed. See generally W. LaFave, 3 Search and Seizure 34 (3d ed. 1996) (when manner of arrest involves excessive force and is therefore illegal, evidence resulting from arrest should be suppressed).

To perform the analysis required by the Fourth Amendment, a court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" Garner, 471 U.S at 7-8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)). In the instant case, Mr. Kansi was accused of a crime in the United States and was found within the territory of Pakistan. The procedures to be followed by the United States in such a circumstance are explicitly spelled out in the Extradition Treaty that exists between the two countries. That treaty describes the procedures agreed to by both parties to "deliver up...those persons who, being accused...of any of the crimes or offences [sic] enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party." Extradition Treaty, Dec. 22, 1931, U.S.-Pak., art 1, 47 Stat., 2122 (treaty signed between United States and Great Britain; currently in force between United States and Pakistan;

Article 3 includes the crime of murder). In addition, both countries have promulgated statutes implementing the treaty. See 18 U.S.C. 3181 et seq. (United States); Extradition Act, 1972 (Act XXI of 1972) (Pakistan) (attached). The statutes grant the accused the right to a hearing and to present evidence. Indeed, one defense to extradition contained in the Treaty and explicitely accounted for in Pakistan's Extradition Act is the right to present evidence that the offense of which the defendant is accused is an offense of a political character. Extradition Treaty at Article 6; Extradition Act § 8 (2). Arguably, the United States' branding the allegations as terrorism would have provided the basis for such a defense. See Fairfax Journal 6/18/97 at A1 (quoting Commonwealth's Attorney Robert F. Horan, Jr. as saying "We considered it an act of terrorism from the very start."); Fairfax Journal 6/20/97 at A10 (quoting President William Clinton as commenting that the arrest of Mr. Kansi "showed the Unites States 'will not relent in the pursuit of terrorists'").

However, Mr. Kansi was not seized in accordance with the law of either the United States or Pakistan. Instead, he was forcibly abducted, held incommunicado, and flown to the United States without any of the protections afforded by the extradition Treaty or the statutes implementing that Treaty. In light of the legal procedures in place at the time of his abduction from Pakistan, it was unreasonable for the Commonwealth to seize Mr. Kansi in the manner of an illegal kidnapping. Because the seizure was unreasonable, it violated the United States and Virginia Constitutions and all evidence which resulted from the seizure should be suppressed.

WHEREFORE, for the foregoing reasons, and any further reasons which may appear to the Court following a hearing in this matter, the Defendant respectfully requests that his motion be GRANTED.

APPENDIX AA

VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINAI :

v. : Docket No. K79148

MIR AIMAL KANSI :

Defendant. :

RESPONSE TO MOTIONS TO SUPPRESS STATEMENTS

The motions to suppress the Defendant's statements allege four grounds for suppression. They are as follows:

1. That the Defendant was seized in violation of the 4th Amendment and therefore the statements are inadmissible.
2. That the government failed to present the Defendant to a judicial officer without unnecessary delay.
3. That the statement was taken in violation of the Fifth and 14th amendments of the United States Constitution and Article 1, §8, of the Virginia Constitution.

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4. That police agents faiied to advise the Defendant of his rights under the Vienna Convention on Consular Relations.

The response will be made in the above order.

1. That the Defendant was seized in violation of the 4th Amendment and therefore the statements are inadmissible.

The defendant in this case is an alien who is not now, nor has he ever been, a citizen of the United States. He was lawfully seized in the nation of Pakistan. However, whether that seizure was legally and technically correct is absolutely immaterial. The Fourth Amendment of the United States Constitution does not apply to either a search or a seizure of a non-resident alien located in a foreign country. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). As was said in that case by the Supreme Court at page 267:

> "The available historical data show therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.
> There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."
> The Court went on to say, at page 275:
> "We think that the test of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim."

In short, since the Fourth Amendment does not apply in Pakistan, the statements could not have been obtained in violation of that amendment.

2. That the government failed to present the Defendant to a judicial officer without unnecessary delay.

Assuming for purposes of this argument that Pakistani law applies, and assuming that the Defendant should have been taken before a Pakistani magistrate, the motion to suppress on these grounds must nonetheless fail. This case is controlled by the Virginia Supreme Court decision in Frye v. Commonwealth, 231 Va. 370 (1986). The exclusionary rule applies only to constitutional violations. As was said in Frye, "Failure promptly to present a defendant as required by Code §19.2-82 is a mere procedural violation where it involves no constitutional error." Id. at 376. Whether one applies Pakistani law or Virginia law, the error (assuming there was one) was statutory. Violation of the statutory law "reaches constitutional dimension only if it results in the defendant's loss of exculpatory evidence." Horne v. Commonwealth, 230 Va., 512, 519 (1986).

3. That the statement was taken in violation of the Fifth and 14th amendments of the United States Constitution and Article 1, §8, of the Virginia Constitution.

The evidence in this case will be that on June 17, 1997, the Defendant was advised of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). (A copy of that advice of rights form was provided to the defense months ago and is attached hereto.) Kansi indicated to Special Agent Bradley J. Garrett of the Federal Bureau of Investigation that he understood

those rights, that he would freely and voluntarily talk to the agents, and was willing to make a statement about his involvement in the CIA killings. He freely and voluntarily signed the waiver of rights form.

A defendant's waiver of his Miranda rights is valid when the waiver is made knowingly, voluntarily and intelligently. Jenkins v. Commonwealth, 244 Va. 445, 453 (1992). Such a waiver was knowingly done here by a college graduate with a master's degree in English. The test for voluntariness is whether the statement is the product of an essentially free and unconstrained choice by its maker. Id. at 453. The evidence in this case will clearly be that the statements of June 17 were freely and voluntarily given after a knowing and intelligent waiver. The Commonwealth asks that the motion to suppress be denied.

4. That police agents failed to advise the Defendant of his rights under the Vienna Convention on Consular Relations.

The Vienna Convention, "even if it could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create constitutional rights. Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional* rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that a

treaty must 'be regarded in courts of justice as equivalent to an act of the legislature')." Murphy v. Netherland, 116 F.3d 97 (1997).

Statutory violations as distinguished from constitutional violations, do not trigger application of the exclusionary rule. See Frye v. Commonwealth, supra. Therefore, this grounds for the motion to suppress should be denied.

Respectfully submitted,

S/_____

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motions to Suppress Statements was hand-delivered to Richard C. Goemann, Counsel for Defendant, this 16th day of October, 1997.

S/_____

ROBERT F. HORAN, JR.
Commonwealth's Attorney

APPENDIX BB

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	:	
vs.	:	CRIMINAL
	:	NO.79148
MIR AIMAL KASI,	:	
a/k/a MIR AIMAL KANSI	:	
Defendant.	:	

Courtroom No. 5G

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 27, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:02 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth's Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

CONTENTS

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS
WILLIAM WHILDEN	28	46	57	65
ZAHID MIR	93	94	--	--
KHAN ASGHAR	96	99	--	--
NASIR ESHEI	103	108	--	--
JEFF FREDERICK	113	118	--	--
THOMAS CAMPBELL	124	137	--	--
DAVID CLARK	171	178	--	--

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EXHIBITS

	MARKED FOR IDENTIFICATION	RECEIVED IN EVIDENCE
DEFENSE EXH. NOS. 1-3 (Affidavits)	72	72
DEFENSE EXH. NO. 4 (Employment documents)	115	115
COMMONWEALTH EXH. NO. 1 (Immigration document)	128	130
DEFENSE EXHIBIT NO. 5 (Response to FOIA Request)	145	
DEFENSE EXHIBIT NO. 7	194	194

(Newspaper articles)
DEFENSE EXHIBIT
NO. 1A-F 198 198
(Video tapes of news reports)
DEFENSE EXHIBIT NO. 8 199 199
(Response to subpoena)

* * * * * * * * * * *

PROCEEDING

(The Court Reporter was sworn.)

THE COURT: Okay; I believe we have defense motions today, right? What one do you want to start with?

MR. GOEMANN: Your Honor, the Court wishes to take that up before the voir dire issues?

THE COURT: Yes.

MR. GOEMANN: All right; the Motion to Dismiss?

THE COURT: The Treaty Motion?

MR. GOEMANN: Yes, Your Honor.

THE COURT: Okay.

MR. GOEMANN: Your Honor, I would ask the Court's permission to incorporate the testimony of the FBI agent from last week into the record for the purposes of the -- this motion's hearing.

THE COURT: All right.

MR. GOEMANN: And I would also ask that the stipulations that were offered last week are still applicable to this motion this week.

MR. HORAN: I'm still trying to figure out which motion we're doing now.

MR. GOEMANN: The Motion to Dismiss to lack of

jurisdiction.

MR. HORAN: Yes.

MR. GOEMANN: Thank you.

MR. HORAN: For the purpose of this motion only, Your Honor.

THE COURT: Yes.

MR. GOEMANN: Your Honor, last week I passed up a copy of the Treaty that this motion relies upon. And in addition, attached to the Motion to Suppress that the Court still has to hear, is a copy of the statute from Pakistan which effectuates the Treaty, the Extradition Statute.

Your Honor, last week the Court heard evidence that Mr. Kasi was seized in Pakistan and there's a stipulation that he was seized in Pakistan by the FBI and that the FBI agents who arrested him had no jurisdiction in Pakistan. That the Defendant was not taken before a judicial officer of any type before he returned to the United States and that the seizure of the Defendant was not made pursuant to any Pakistani paper or document.

However, the Court also heard testimony that at some point during that process the FBI turned custody over to Pakistan. I believe early in the hearing the

agent testified simply that he was in the custody of a foreign power. I believe on cross examination, eventually after a rather lengthy pause, he finally admitted that at some point during that process he was in the custody of Pakistan.

Your Honor, all of those facts indicate that the Extradition Treaty and the provisions of the Extradition Treaty between the United States and Pakistan should have been triggered when Mr. Kasi was taken into custody and put into Pakistani custody. At that point, the Pakistani extradition law should have been applied and under the United States Pakistan Extradition Treaty, the laws of each sovereign are to govern when somebody is taken into custody pursuant to that Treaty.

And in this case you have Mr. Kansi taken into custody by the Federal Bureau of Investigation, given over to the government of Pakistan and then at some point later, at least two days later, returned to the FBI for a flight back to the United States.

Once he was placed into the custody of Pakistan, Pakistani law governing extradition should have been followed. And because it was not followed, it was a violation of the United States Pakistan Treaty.

That takes this case outside of the Alvarez Mochane case. As the Court is well aware, I'm sure, in the United States versus Alvarez Mochane, the United States Supreme Court found that there was no violation of a treaty between the United States and Mexico and based on the fact that there was no violation of the treaty, they found that the general rule of Kerr versus Illinois applied, which basically states that the manner in which a Defendant is brought into the jurisdiction of the Court does not effect the Court's jurisdiction. But the Court distinguished Kerr or said that Kerr would be distinguishable if there had been an actual violation of the Mexican United States Treaty. And in that case the Court went on to find that no such violation had occurred.

In this case, however, Your Honor, the Treaty between the United States and Pakistan specifically states that the extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and the territory of Pakistan respectively in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

And here, there was no conformity with the

laws of the territory from which the surrender was to be claimed. That is the laws of Pakistan. The violation of the laws of Pakistan therefore became a violation of this Treaty and therefore different from Alvarez Mochane. And since it is different from Alvarez Mochane, Your Honor, I submit that the -- because there was a violation of that Treaty, that therefore takes this case outside of the rule of Kerr versus of Illinois and robs this Court of jurisdiction to hear this matter.

THE COURT: Anything? Do you want to -- I've read your response memorandum, adding it on.

MR. HORAN: Your Honor, I would only comment to the Court, we are precisely within the situation that as involved in Alvarez Mochane. Just as in that case, he wasn't brought here under the Extradition Treaty as was the case in Alvarez Mochane. He wasn't brought here under the Treaty either.

The Supreme Court of the United States said, that the only time you can look to the Treaty for help is when he's brought here under it. Neither Alvarez Mochane or this Defendant was brought here that way, the Supreme Court holding in Alvarez Mochane covers this case and we ask the Court to deny this motion.

THE COURT: Anything else you want to say, Mr. Goemann, about that?

MR. GOEMANN: No; Your Honor.

THE COURT: All right; I do not find -- well, I find that the Treaty -- I find that the Treaty is a matter of -- between the United States government and the government of Pakistan. It does not afford any individual an individual right to have the Treaty followed or not followed or to get the case dismissed if it is or isn't followed.

Mr. Kasi is before the Court now and we have the jurisdiction to try him for the alleged crimes here. So I deny the motion. The next motion.

MR. GOEMANN: Your Honor, If I could just ask if certain witnesses are present in the Courtroom?

THE COURT: All right.

MR. GOEMANN: Jeff Frederick, Bill Rich, Christian Orchetty [ph].

(No response.)

MR. ROMANO: Your Honor, I have two motions which I believe are resolvable. One is, a notice and motion for daily transcript of the proceedings.

THE COURT: Uh-huh.

APPENDIX CC

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COURT

----------x

COMMONWEALTH OF VIRGINIA, :

vs. :

MIR AIMAL KASI : CRIMINAL

a/k/a MIR AIMAL KANSI, : NUMBER 79148

Defendant. :

----------:

Courtroom No. 4H

Fairfax County Judicial Center

Fairfax, Virginia

Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert Horan, Esquire

Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Esquire

Judith Barger, Esquire

OFFICE OF THE PUBLIC DEFENDER

AFTERNOON SESSION

(The Court reconvened at approximately 2:00 o'clock p.m.)

speak.

So that motion to suppress is denied. And we're onto the next one I guess.

MS. BARGER: Your Honor, I will be addressing the motion to suppress pursuant to the the defendant not being informed of his rights under the Vienna Convention, but it's entitled like many of the other ones Motion to Suppress.

THE COURT: Well, let me be sure. I think that may be the one that we – let's see. Is that this one?

MS. BARGER: Yes.

THE COURT: Okay. This is the one we just ruled on. And this is the memorandum that goes with it.

MS. BARGER: Yes, it is.

THE COURT: All right. Well, could I just ask you a question at the beginning?

MS. BARGER: Yes, Your Honor.

THE COURT: Because I thought I cleared this at the beginning, whoever it was who at the beginning along about 10:00 o'clock or so. Do you take the position that a violation of this Vienna Convention if it does not rise to the level – that the violation of the Vienna Convention in and of itself

requires suppression?

MS. BARGER: No, Your Honor.

THE COURT: Okay.

MS. BARGER: Our position is that in this case – and to put it very simplistically, that the defendant's rights pursuant to the Vienna Convention which are that they have the right to contact their consul and once they are taken into custody they are to be told of that right without delay according to Article 36 under the Vienna Convention. That is attached to the memorandum, Your Honor.

THE COURT: And so that I can focus on your argument so I won't be worried about whether there is one, there isn't any case, is there?

MS. BARGER: Any case that says that?

THE COURT: Any case that suppresses the evidence based on one not being told about their rights under the Vienna Convention.

MS. BARGER: There is none because that argument has never been made, Your Honor.

THE COURT: Okay. Then I want to hear your argument.

MS. BARGER: The cases that are cited by the

Commonwealth, the first one really from 1829 doesn't say obviously anything about the Vienna Convention because that was over a century before it was enacted, Your Honor.

But in Murphy versus Netherland, the other case, that this is the more recent case cited by the Commonwealth's Attorney at 116.FED.3rd.97. That case basically dealt with habeas issues. In that case the defendant was charged with capital murder. He entered a plea of guilty.

The Vienna Convention issue was never brought up at the trial level, it was not brought up on direct appeal. The issue wasn't thought of or brought up until a habeas position was filed just shortly before his execution.

So that issue and that opinion what the Court addressed is the fact that their arguments were procedurally defaultive because they never raised them. Not only did they not raise them at the trial level or on direct appeal, but the Constitutional issue and the language that the Commonwealth cites in that case is essentially in the Murphy case they had two arguments.

The first one was that a violation on the Vienna Convention is in and of itself a Constitutional

violation and that means that we have to overturn the conviction. That was the first argument. That was raised at the District Court level on habeas.

Now, the second argument, and that's contained at the end of their opinion, wasn't even raised at the District Court level, it wasn't raised until they got to the Circuit Court level on habeas.

And that was that the failure to inform the defendant of his rights pursuant to the Vienna Convention made his guilty plea involuntary and not a knowing and voluntary guilty plea. That was their argument.

The Court never ruled on that. What the Court said in Murphy versus Netherland was that it was procedurally defaultive because it wasn't raised until they actually got to the Circuit Court.

So there has been no ruling made. And that is as similar as I can get to what happened in this case. All of the cases, and there are only a handful of them, actually that have dealt with the Vienna Convention issue at all, basically are when the issues have been raised after conviction on either direct appeal or in habeas petitions and the Courts have dealt with them in that way.

This particular issue has never been raised

It's a case of first impression. Anywhere in the United States, Your Honor, it hasn't been raised in any other Circuits.

And essentially our argument in this case is that the defendant when you're interviewing and interrogating, conducting a custodial interrogation of a foreign national then his rights pursuant to the Vienna Convention are he has the right to notify the consulate from his country, should act as essentially a, in this case a sixth miranda right. There were five rights on the form. Sometimes the rights, I think in the original case there are four, but they're broken down into more. That it should operate as an additional if you want to call it a miranda right, before a statement can be knowing and voluntarily and intelligently made.

Our argument essentially goes along with Ms. Meleen's argument as to the knowing and voluntary and intelligent waiver of the miranda warnings and the rights that are given to a defendant in the case of miranda.

Now, anticipating the Court's question, why didn't the Court in miranda say then that a defendant should be read these rights.

I. I don't think that was an issue. Well, it

couldn't have been an issue because the miranda decision was in 1966 and the Vienna Convention was not ratified until 1969. So that's why it's not actually contained within the miranda opinion, Your Honor.

But it goes right along with Ms. Meleen's arguments as far as a knowing and voluntary and intelligent waiver would go when you're dealing with someone, a foreign national is someone who by definition is not from the United States, someone who in the specific facts of this case is not familiar with the law of the United States, is not familiar with such things as our Constitutional rights, as their right to remain silent.

The same reasoning for telling them that they have the right to contact a consulate, someone who is from their country who is aware and who can help out and explain to them, who can help get them an attorney, help get them counsel if they need it, help to advise them, someone that they can trust, someone who's from their country, not from the country, in this case the foreign country who is arresting him.

The same reasoning applies for telling the defendant of this right, as does giving him the miranda warnings, Your Honor. The Court in miranda held that the

prosecutor may not use statements stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effected to secure the privilege against self incrimination.

Your Honor, the privilege against self incrimination doesn't mean anything if the defendant doesn't understand when those statements can be used against him, that they can be used against him at trial, that a trial is coming, that they can be used against him to prove him guilty, that the burden of proof is beyond a reasonable doubt.

These are the kinds of things – and I know that what I last mentioned is not contained within the miranda warnings, but these are the kind of things and the reasons why we need the same procedural types of safeguards, to insure that if the United States especially in this case is going to go into another country, is going to abduct a person, bring him back to the United States for trial, that they question him on a plane before he can even get to the United States to see an attorney or speak with an attorney or speak with someone from his consulate.

The Vienna Convention article 36 specifically states that he should be informed of these rights without

delay. It ways that in fact twice, your Honor, in that code section. Never inform him of his rights before statements are taken. And these are obviously – whenever a statement is taken in a case that can be used against a person later whether it has exculpatory or inculpatory statements or both types of statements in it that person should understand what their rights are, they should be able to speak with – that's a very important part of the process Your Honor. They should be able to speak with their consulate before the decision of whether they want to talk or not is made so that they can ask him, they can give advise, he can hire an attorney and things like that.

For those reasons, Your Honor, we're asking to suppress the statements that were made. He wasn't ever informed. Mr. Horan, as is noted in our motion sent a letter dated July the 3rd, over a month after he had been arrested, abducted, flown to the United States and incarcerated here.

By that time all of their evidence had been taken. It was safe to say that it was – I think it's fair to say it was safer then to advise him of this rights then. That does not in any way comply with the Convention's mandate that he is informed of his rights.

without delay.

Informing him a month after he's been incarcerated and statements have already been taken and evidence has already been gathered does not even come close to complying with that.

And for those reasons, Your Honor, we would ask that you suppress the statement and finding that he was not informed of his rights pursuant to the Vienna Convention and essentially adding another prong onto the miranda warnings when a foreign national is being interrogated.

THE COURT: Are you aware of any case that has held that the Vienna Convention creates individual rights as opposed to expressing how nations deal with each other and with individuals?

MS. BARGER: A case that says that the Vienna Convention –

THE COURT: That says that it creates individual rights.

MS. BARGER: I'm sorry, that it creates individual rights.

THE COURT: That an individual is entitled to rely on the Vienna Convention is any process.

MS. BARGER: Your Honor, no, because there is no –

THE COURT: Okay. There has never been one?

MS. BARGER: There has never been one that I know of, Your Honor.

THE COURT: Okay. Any response?

MR. HORAN: Yes, Your Honor. The Mario Murphy against Netherland was a capital case and while it was decided by the 4th Circuit that the claim was procedurally defaultive the opinion is important for what Justice Luttig said about the supremacy clause. Justice Luttig said that the supremacy clause does not convert violations of treaty provisions regardless of whether those provisions can be said to create individual right into violations of Constitutional rights, just as a state does not violate a Constitutional right merely by violating a federal statute, it does not violate a Constitutional right merely by violation a treaty. And he cites Foster against Nealson, the 1829case that states that a treaty must be regarding in courts of justice as the equivalent of an act of the legislature.

The Vienna Convention simply doesn't create Constitutional rights. The exclusionary rule only applies

where Constitutional rights have been violated.

And Justice Luttig in his opinion could have been quoting from the preamble of the Vienna Convention on consular relations which in its preamble says this.

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations irrespective of their difference Constitution and social systems and realizing that the purpose of such privileges and immunities is not to benefit individuals but to insure the efficient performance of functions by consular posts on behalf of their respective states.

That language in the preamble along makes it clear that that convention is not creating individual rights, that convention is creating rights among nations and this defendant didn't get any individual right from the convention that he can rely on as being some sort of Constitutional mandate.

Your Honor is correct when you asked the question are there any cases that ever said that the Vienna Convention does what the defense is requesting here. And the answer is a resounding no.

And the reason the answer is a resounding no I

would suggest to the Court is because this treaty occupies the exact same legal status as an act of the legislature, it doesn't act as any Constitutional provision upon which this defendant can rely.

THE COURT: Anything else, Ms. Barger?

MS. BARGER: Your Honor, I just want to make clear what our position is. We are not saying that by violating the Vienna Convention that is a violation of the Constitution. That is not what our argument is.

Our argument is that when a foreign national is custodially interrogated not to inform him of his right to contact the consul from his Country makes the waiver of the miranda warnings which are the rights that are contained in the 5th Amendment invalid. It makes it so that it is not a knowing and voluntary and intelligent waiver. And that is what is required by the Court in the case of miranda.

Now, that issue was addressed again in the Murphy case where the Court said at the end of that case, and what Mr. Horan was quoting was what I had said to the Court earlier, their first claim that a violation of the convention of not informing the defendant of his rights pursuant to the Vienna Convention in and of itself was a

Constitutional violation. That's what the Judge was talking about and that's what the quote comes from, that part of the opinion.

There's a second issue and that was because you didn't read him his rights or tell him of his right to contact the consulate pursuant to the Vienna Convention his guilty plea was not a knowing and voluntary and intelligent guilty plea.

And that's as close to the argument that we're asserting that I can get. And the Court did recognize that that may have been a defense but said it was procedurally defaultive. It never ruled on it, Your Honor.

So that is the issue that we are addressing now. We are not arguing that the Vienna Convention creates a Constitutional right. What we're saying is that when you interrogate someone, when a police officer interrogates someone who is in custody that for the waiver of his 5th Amendment rights to be a knowing and voluntary and intelligent waiver as is prescribed by miranda he must be informed of his rights pursuant to the Vienna Convention to contact the consulate of his country.

THE COURT: I deny that motion to suppress. I

think although it's almost mathematical, I think I can show you that your argument is circular and can't lead anywhere because it just runs around in a circle and one piece of it depends on the other piece of it, depends on the other piece of it until you come back to the beginning.

The rights that miranda requires be informed and informantly waived are Constitutional rights. If the rights, if there are any, under the Vienna Convention are not Constitutional rights as beyond for adventure they are not, would have no more efficacy than a statute and you can't say that's something that ought to be put into miranda because miranda only talks about Constutional rights.

And if you're confused about what I said I think that demonstrates that your argument must fail, that particular argument. The best argument that you've got, and I can read this around the periphery, although it may have been the very point you were trying to make, although maybe you didn't try to make it as all and will wonder what I'm talking about. But what I think is the best argument is one of the factors that should be considered in considering voluntariness is whether he had some other

rights that were not taken account of. And maybe that's a factor, except for two things.

1. I find that the Vienna Convention does not create any individual rights. It's not an individual right treaty. It's a treaty between nations and it can't give rise to an individual right that an individual can claim.

But secondly and more importantly, at best it's only part of the picture here. And even if you include it in the totality of the circumstances his waiver of the Constitutional rights that he was clearly told about and that he clearly waived on the miranda form was a voluntary waiver of those rights.

And, again, his education is very important. If he didn't know anything about the Constitutional he sure didn't know anything about the Vienna Convention. But he was told these are rights that you have and you're waiving them and the fact that he wasn't told about some other right that you think he might have had doesn't affect the voluntariness in the totality of the circumstances of the waiver that he made.

I guess if anybody can make sense of that we can move on with it. But in any event, I deny that motion

to suppress.

And I just have one left so I guess that must be –

MS. MELEEN: You do, Your Honor. And that is entitled motion to dismiss the indictment, the one with the dismissal.

THE COURT: Okay.

MS. MELEEN: Your Honor, I intend to follow very closely with the memorandum in support of the motion on this one because it is difficult to articulate and very specific and so I intend to go through them at random with Your Honor.

Virginia Code 19.2-80 sets forth the requirements that a law enforcement officer making arrest under a capias which you will notice that the language of this is – I know a lot more than I did when I typed this, let's put it that way, Your Honor.

This is some of the information that we were trying to get as a result of our subpoena request and so you can set where we were at a disadvantage by not having this information.

But the argument goes that when an arrest is made the law enforcement officer is required to bring the

(4)

Supreme Court, U.S.
FILED

98 1812 MAY 6 - 1999

No. _____

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MIR AIMAL KASI

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

On Petition for a Writ or Certiorari to the

Supreme Court of Virginia

APPENDIX - VOLUME III

APPENDICES DD THROUGH NN

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APPENDICES --- TABLE OF CONTENTS

VOLUME III

APPENDIX DD

Transcript of hearing in Virginia Trial Court on Defendant's Motion to enforce subpoenas served to the FBI and CIA...362

APPENDIX EE

Defendant's Motion for Order to Show Cause with regard to the CIA's failure to comply with a subpoena and Affidavit in support Thereof.....386

APPENDIX FF

Defendant's Motion for Order to Show Cause with regard to the FBI's failure to comply with a subpoena and Affidavit in support Thereof.....390

APPENDIX GG

Memorandum in Support of Defendant's Motions for Order to Show Cause.....394

APPENDIX HH

CIA's Response to the Rule to Show Cause.....399

APPENDIX II

FBI's Response to the Rule to Show Cause.....414

APPENDIX JJ

Executed Bench Warrant for Petitioner.....423

APPENDIX KK

Testimony of Mirwais Kasi.....425

APPENDIX LL

Robert O'Harrow, Jr., *Suspect in CIA Slayings is Returned to U.S.*, WASHINGTON POST, June 18, 1997, at A1, A10.....468

APPENDIX MM

Thomas A. Lippman, *2 Governments Cloak Details of the Capture*, WASHINGTON POST, June 19, 1997 at A10, A11.....477

APPENDIX NN

David B. Ottaway, *Suspect's Moves, Motive Remain Mysterious: Kansi Left Life of Privilege to Move to U.S.*, WASHINGTON POST, June 19, 1997, at A12, A13.....482

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APPENDIX DD

PARTIAL TRANSCRIPT

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----------x

COMMONWEALTH OF :
VIRGINIA, :
vs. : CRIMINAL NUMBER 79148
MIR AIMAL KASI :
a/k/a MIR AIMAL KANSI, :
Defendant. :

----------x

Courtroom No. 4H
Fairfax County Judicial Center
Fairfax, Virginia
Monday, October 20, 1997

The above-entitled matter came on to be heard before THE HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, Virginia, beginning at 10:00 o'clock a.m.

APPEARANCES: On Behalf of the Commonwealth:

Robert Horan, Esquire
Commonwealth Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire
Frank Romano, Esquire
Crystal A. Meleen, Esquire
Judith Barger, Esquire
OFFICE OF THE PUBLIC DEFENDER

PARTIAL TRANSCRIPT

(The Court Reporter was sworn.)

THE COURT: Okay. You have motions today?

MR. GOEMANN: Yes, Your Honor. Does the Court have any preference in terms --

THE COURT: No. Just let me know what we're arguing is all.

MR. GOEMANN: Your Honor, first --

MR. HORAN: Your Honor, I wonder, if we might, in the interest of time. On some of these motions, I will stipulate to exactly what the allegations are of the defense in this case.

I will stipulate for purposes of argument on this record that the Defendant was arrested in Pakistan by an FBI agent; for purposes of this record I will concede that the FBI agent doesn't have any jurisdiction in the nation of Pakistan; that he was not taken before a judicial officer as was alleged in Ms. Meleen's motion until he returned to the United States and was presented before this Court.

That in the course of time from his arrest until he was brought to this country there was no compliance with the Vienna Convention until my letter of July 3rd,

that counsel for the defense, as is alleged in Ms. Barger's motion.

And that the seizure in Pakistan was not made pursuant to any Pakistani paper or document which would allow him to be seized under the laws of Pakistan.

Your Honor, I make that stipulation because I would suggest to the Court that on three of the four motions they are legal argument, really. I will stipulate the underlying facts of the legal argument on each of those is proper which would leave us with the fourth motion to suppress, which is Mr. Goemann's motion which deals with Miranda and voluntariness.

MR. GOEMANN: Your Honor, could I ask for a brief recess to talk with my co-counsel about these stipulations and the affect they might have on the motions we have presented today? This is the first I'm hearing about it and I'd just like a brief recess to --

THE COURT: Okay. We'll take a five minute recess.

MR. GOEMANN: Thank you.

(Brief recess.)

THE COURT: Something that occurred to me while I was out there in terms of time is I don't know whether

anybody's here from the INS, the FBI or the CIA, but --

A FEMALE VOICE: Yes, Your Honor.

THE COURT: Okay. Well, we might take that -- I don't think that will take very long. We might take that up so that person can go.

MR. GOEMANN: No objection, Your Honor.

THE COURT: You said with regard to the INS, you said -- you asked me to dismiss that, right? I don't know what counsel -- which one of you's going to --

MS. MELEEN: Mr. Romano's going to do that today.

THE COURT: Okay.

MS. MELEEN: It is true. We asked for a rule -- or to dismiss that rule.

THE COURT: Okay. So the rule against --

MR. HORAN: Your Honor, under the -- a subpoena duces tecum, that material was to be provided to the Court. That's what the subpoena duces tecum said. And it wasn't. It was provided to defense counsel, under a subpoena duces tecum, and I think it should be provided to the Court.

MR. ROMANO: Your Honor, I can deal with that. That -- the response that we got from INS was not a

response to the subpoena duces tecum. It was a response to the Freedom Information Act Request. The Freedom of Information Act Request was just complied with by the Department of Justice, Immigration Naturalization Service sent to Kara Harrison, who's an investigator in our office, who filed a Freedom of Information Act Request in response to the Freedom of Information Act, and that's what it says. It was signed by S. Foiapa, F-O-I-A-P-A, Officer, and it's in response to the Freedom of Information Act. We have yet to receive a response through the Court from the INS, the FBI or the CIA.

THE COURT: But you asked me because you got that to --

MR. ROMANO: Right.

THE COURT: -- to dismiss the INS.

MR. ROMANO: Your Honor, we're not interested in legal arguments. We were interested in obtaining the documents -- the INS through the Freedom of Information Act has provided the documents that they say they're in possession of. Therefore, there's -- a subpoena, even though it hasn't been complied with, the documents were provided under the Freedom of Information Act. They did not need to be filed with the Court; they were provided

directly to us.

THE COURT: Okay. Do you want me to hold the INS in contempt, Mr. --

MR. HORAN: No, Your Honor.

THE COURT: Okay. The INS --

MR. HORAN: I just want -- I'm not copied on anything that goes on. I have no idea what -- INS has never communicated to me.

THE COURT: They haven't communicated with me either.

MR. HORAN: As to whether they even have documents. But I understand they produced documents. It was my understanding they were producing them in accordance with the subpoena duces tecum.

THE COURT: What can you show him that says that it's not in connection with that? And do you have any objection to sharing with what you got?

MR. ROMANO: Yes, Your Honor, it's a freedom of information for us, not for the Commonwealth.

THE COURT: Okay.

MR. ROMANO: There are discovery rules --

THE COURT: I won't deal with that today, but I just wanted you to show him something so he would know

that it wasn't in connection with the subpoena.

MR. HORAN: Your Honor, what this document says at the foot of it it says as per our telephone conversation, enclosed a copy of the subject's file, the subject being Mir Aimal Kansi. This copy may not be a complete copy of his file nor is his current copy of his file. This is the only material in our possession.

THE COURT: Well, let me say this. Nothing has been filed with the Court in response to the subpoena. It was their request that I hold the INS in contempt for not complying. They want to withdraw that. It is withdrawn and what you do with it next is up to you.

So that leaves the FBI and CIA as to whom we have a response. Do you have response to their -- was there anything else you were going to say other than -- your name is?

MS. SHARON: I'm sorry. My name is Andrea Sharon. I'm from the Justice Department.

THE COURT: Okay. Was there anything else that you wanted to say other than what you've submitted in writing?

MS. SHARON: Well, unless the Court has further questions. I'll be happy to rely on our papers.

THE COURT: Okay. Did you want to respond?

MR. ROMANO: I did, Your Honor.

A subpoena duces tecum is an order of the Court to produce documents. There are in essence three ways to reply to that subpoena. One is to comply, one is to ignore it, and one is to move to quash the subpoena.

There has yet to be compliance, as Your Honor has already mentioned. There's been nothing filed by any government agency, I believe, other than Interpol, which responded virtually immediately and was the subject of an earlier motion. Interpol responded to the subpoena and I believe they did file documents with this Court, which the Court had under seal which is one of the requirements for Interpol to respond.

Interpol did respond. The Immigration of Naturalization Service is no longer a subject of this, but the CIA and the FBI responded to our initial -- our initial subpoena request on July 17th which requested compliance by July 31st in the Clerk of the Court's office with letters that say in essence, we don't have to obey your subpoenas, see these cases. Those are the cases that we cited to Your Honor that were the subject -- that were attached by Ms. Meleen to the initial request for rules to

show cause. There has never been compliance with the subpoena.

There were letters exchanged from the -- between us and the CIA. There was initially a letter on the 27th of July from the CIA. We'll deal with that one first, from Linda Siprianie, attorney advisor for the CIA. That, in essence, said, "Please be aware that a state court subpoena is not enforceable against a government agency, federal agency." And cited the cases that were cited before, starting with United States -- Toohey versus Rainey in 1951 and the cases that allegedly follow that, to bring the government outside the purview of a subpoena in this case.

In this letter they made a statement that the subpoena is not enforceable against a federal agency and they said accordingly we are undertaking no action with respect to the subpoena.

They then cite Toohey and they then ask us to submit a specific request for CIA records that complies with our Toohey regulations.

The Toohey regulations are the CFR's that govern subpoenas for federal agencies, both the Department of Justice and the CIA have their own regulations, and in

essence what the regulations say are that no government official when served with a demand for documents or testimony shall comply until it's run by an existing United States Attorney who will determine whether we're going to comply or not.

There are provisions for what happens if that compliance or the decision on whether to comply comes -- has not been made by the time the subpoena has supposed to have been replied to in the Court.

Those provisions state that what you will do, what the Federal official will do is show up in the Court and ask the Court to stay the compliance with the subpoena.

If the Court denies that stay, they're then to respectfully decline to comply with the subpoena and I believe I cited -- those are cited in the memorandum as part of the rule to show cause, but in terms of the CIA it is 32 CFR 1905.3 --

THE COURT: I think they attached that to their --

MR. ROMANO: I believe they did. And that in essence says if response to a demand is required before a decision is made an attorney from the Office of the

Attorney General shall appear before and first accord our other competent authority with a copy of this regulation and state that the demand has been or is being, as the case may be, referred for the prompt consideration of the Court with CIA officials, and ask the Court to stay the demand.

If the Court declines to stay or rule that the demand must be complied with, the employee upon whom the demand has been made shall, if so directed by the general counsel of CIA or designee, respectfully decline to comply.

As Your Honor knows, that's not happened. No one from CIA ever appeared before this Court, before or -- at some time contemporaneous with the requirement that they comply with the subpoena to ask this Court to stay their compliance with the subpoena, or if the Court had denied that stay to say that someone has told me not to comply.

And in essence, up until this time, no one has said that. No one has said that Mr. Tenant, I believe, who's the head of the CIA has directed anyone not to comply. That's what Toohey says. In 1951 the Supreme Court said that if a government official comes before us

and says he is prohibited by his agency head in compliance with valid agency regulations from complying with the subpoena, that you cannot hold that person in contempt.

There has been yet no representation by any federal official, whether at the director's stage or any stage below that that there is a valid federal regulation that is -- CIA that prohibits compliance with the subpoena.

After this conclusory statement by Ms. Siperanie, we responded that the cases that they cite may stand for the proposition that a subpoena is not enforceable, but the proper forum for that determination of that issue is the courtroom.

It is our position that the action taken by the agency or inaction in response to the subpoena should take the form of a challenge to the subpoena in Court. The agency's assertion for immunity is not properly made in correspondence between counsel.

This is just another extension of the rule that when there is a controversy, there's not supposed to be colleague between counsel to resolve it.

Mr. Horan and I or Mr. Goemann and I or Ms. Meleen or Ms. Barger, and Mr. Horan are not supposed to

stand in Court and argue about it. They're supposed to state their positions and let Your Honor, as the arbiter, make the decision. This has yet to happen.

The CIA wrote us a conclusory statement that said, in essence, we're not going to obey your subpoena. We wrote them back in response to what they call their Toohey regulations.

There seems to be some understanding on the part of the federal agencies that these Toohey regulations are somehow a third way in which information may be chiseled out of some of these agencies.

The Toohey regulations, as we read them, are what the agencies call the Toohey regulations and they are embodied in the CFR's are means by which these agencies by which these agencies comply with subpoenas. It is not some third way to get us information.

In our response, they ask for more specific information. We wrote them back saying it is not in our interest -- our interest is in obtaining the information, not is jousting with the CIA or the FBI in hopes of getting at the Court and making a spectacle of ourselves.

There has yet -- and in response, we -- to the CIA especially, we delineated 18 specific requests, as

specific as we could get them. And the agency -- the agency required a statement of why the information was sought and what the relevance was.

With respect to the CIA, on the 12th of September, we received responses that said with respect to your 18 categories, that they're looking into two of them, they answered one of them, and with respect to the other ones they said we're not going to comply.

They have yet to come before this Court -- the CIA has yet to come before this Court and say this is the reason we are not complying to your subpoena, because the doctrine of sovereign immunity, which we gather, is the doctrine that's embodied in the cases that they cite and that we cited also in our request for a rule to show case, stand for the proposition that the government -- a federal agency is completely immune to service of process.

The cases, as we said the last time we were before Your Honor, there is no case that decides this issue in the circumstance such as this. There is no case cited by the CIA, the FBI or the INS, all of which this is a form letter, every single one of their responses cites the same cases in the same order.

There is no case that says in -- in the -- in an

ongoing criminal prosecution, where the Defendant has yet to go to trial, that sovereign immunity insulates the government from service of process.

There is no case that says as we said in our -- in our request for the rule to show cause and in support that the Defendant's right to compulsory process, the Defendant's right, 6th Amendment right to call for evidence at his behalf can be trumped by the, in essence, civil action, tort doctrine of sovereign immunity, of a common law doctrine developed to insulate the government from civil actions.

Now I suppose that in essence this -- the request for the rule to show cause is a civil action. But the underlying action with -- under which we requested the information is a criminal prosecution. None of the cases, as I said, address that.

We would respectfully interpose the Defendant's right under the 6th Amendment, the compulsory process, and to call for evidence in his behalf.

We would interpose that and we oppose that to the doctrine of the sovereign immunity which is, in essence, to free the government from being harassed by the people so that they don't have federal agency

functionaires running all over the place gathering documents.

The right not to have people running around looking for documents can easily be trumped by the Defendant's 6th Amendment right to compulsory process and to call for evidence in his behalf. And in addition, the reasons that we ask for some of this information were to support the motions that we are going to have to argue, without the right to be free from unreasonable searches and seizures, the right against self-incrimination.

All the documents that we requested, or at least some of the documents that we requested would have been instrumental in our understanding of the circumstances under which Mr. Kansi was abducted and transported and held in Pakistan. The FBI's authority for doing so, whether or not there were decisions made at the level -- higher levels of the FBI to do what Mr. Horan has already stipulated they have done, which is to act without authority to abduct a person in a foreign country.

We requested documents on whether or not there were decisions taken in the CIA or the FBI with respect to that. We don't believe that the CIA agents on the ground in Pakistan were given free reign to do whatever they

wanted to do.

All of this feeds into the unreasonableness of the seizure, the circumstances under which he was held, whether or not the United States made a conscious decision with or without the agreement and the concurrence or the collaboration of the government of Pakistan to violate Mr. Kansi's rights, whether they be rights held under this Constitution, the laws of this country, international law or Pakistani law.

The same can be said with respect to the FBI. The FBI recently in a letter responded to what they also call their Toohey regulations by sending us in essence a bunch of clippings from newspapers, which they said was -- were consistent of their file.

As Your Honor can see, we did not ask for rules to show cause against the State Department. Those subpoenas were served in the District of Columbia.

We understand that there were -- there were some grounds for saying that maybe those subpoenas jurisdictionally were not served through the out of state subpoena process as maybe they should have been done. But the CIA was served in Langly [sic], the INS was served in Arlington, I believe, and -- the FBI was served in

Arlington and the CIA -- the CIA, the INS and FBI were all served in Virginia. These are valid jurisdictionally in the Commonwealth of Virginia, yet have the CIA or the FBI to respond in Court to the subpoena.

They have not appeared and said that a valid agency regulation was the means by which their boss, the head of their agency or some designee, prohibited them from responding. And indeed what they attempted to do was respond to what they cited as our Toohey letters.

In the letters that we sent in response to their denial of the ethicacy of the subpoenas, we said we are not waiving our rights under the subpoena. In fact, Ms. Sharon and I had a conversation on the phone where in essence she said drop the subpoena and we'll try to comply with the request. That was obviously not something that we were willing to do.

Ms. Sharon then said, well, you know, you're going to lose. We've never lost one of these and our response was there's a first time for everything, and we're Public Defenders and we're used to losing so let's get into court and fight about it. That has not happened.

This is the first time we've been here. There has been no statement even in compliance with the

regulations of the CIA or FBI whether or why they have failed to comply, and we would ask you to hold them in contempt or in the alternative, order them to comply with the subpoenas.

MR. GOEMANN: Court's indulgence.

(Mr. Goemann conferred with Mr. Romano.)

MR. ROMANO: Mr. Goemann's pointed out to me that we have yet to have a response from the FBI to the subpoena, a response from the FBI was also in response to the Freedom of Information Act request.

THE COURT: Okay. Ms. Sharon?

MS. SHARON: Your Honor, under the doctrine of sovereign immunity and the Toohey doctrine, a state court does not have jurisdiction to compel a federal employee to comply with a subpoena or other request for documents obtained by the employee in the course of their official duties. Similarly in Toohey, the -- a subordinate federal officers can't be held in contempt for failing to comply with court order to produce documents when they're relying on valid promulgated regulations.

So just based on the doctrine of sovereign immunity and the Toohey doctrine, this Court does not have authority to force the government to comply with the

subpoenas or hold their particular agency officials in contempt.

Now I'd also like to point -- respond to a couple of the points made by the Defendant. First, it is our position that we have responded to the subpoenas, to the Defendant. First, with respect to the CIA. Shortly after receiving the -- within just a few days after receiving the subpoena, the CIA responded with a letter informing the Defendant that, in fact, it is the government's position that the subpoenas are jurisdictionally invalid, but also advising Defendant that he could pursue the agency regulations and seek information in that way.

In addition to providing this letter directly to Defendant, the CIA also cc'd the Court and did file a copy of the letter with the Court. So, in fact, did respond to the subpoena in that way stating its objection.

Similarly, the FBI responded to the subpoena just shortly after. Again, noting their objections that the subpoena is jurisdictionally invalid and also advising the Defendant that the Defendant can pursue the regulations should he still continue to seek the information.

Now having sent those letters out before the return date the Defendant did not respond to those letters until after the return date, in which the Defendant sent letters, Toohey letters, as I'll call them, to the CIA and to the FBI.

Upon receiving those letters I called the Defendant and we spoke and, you know, I said in light of the Toohey letters, you know, is it -- do you still want to pursue the subpoena and he said, well, what I'm interested in is the documents and I said, well, we'll see if it's necessary to quash we can go ahead and do that, but at that time, given that the Defendant was pursuing the regulations, we didn't think it was necessary to involve the Court at that moment.

Now that the Defendant is seeking to compel compliance, which is three months after return date, we're coming here on a more formal basis to give our response and note our objections that, in fact, these are jurisdictionally invalid subpoenas. We do believe we have responded, but even regardless of whether the Court deems our responses as sufficient, because of the doctrine of sovereign immunity and the Toohey doctrine, there's still no jurisdiction here to compel compliance with the

subpoenas and for those reasons, the custodian of records for each of the agencies should not be held in contempt.

I would also say one other point which is in order to leave no ambiguity to the extent that the subpoenas are left somewhat dangling, I would like to also rely on our responses to the subpoenas, officially orally move to quash the subpoenas at this time for the same -- based upon the same reasons of sovereign immunity and the Toohey doctrine.

So unless the Court has further questions --

THE COURT: Anything else, Mr. Romano? Anything else in response?

MR. ROMANO: Yes. It seems to be position of the government agencies, and Ms. Sharon repeated this, that these are jurisdictionally invalid subpoenas. That is not the case. Toohey did not say that they are jurisdictionally invalid. Just said if a Federal official responds to the Court and says that he or she in response to a valid government regulation has been prohibited from responding, that you cannot hold him in contempt. That does not go to the jurisdictionally validity of it. It goes to whether or not you can punish somebody for not complying with it.

Ms. Sharon also said that they did not think to -- they did not want to involve the Court. How else can you respond to a subpoena issued by a Court that involved the Court.

What they have done is attempt, by correspondence, to invoke sovereign immunity using as justification and as authority cases which do not decide the issue.

The reason that we responded as late as we did because in the original responses both from the FBI and the CIA they said if you will be more specific in your request we will attempt to comply under this -- what they consider hybrid Toohey regulations, which according to the regulations are their way to respond to the subpoena. We gave them a lot of time in order to respond. When they did not respond, that's when we requested the rules to show cause.

We were trying to give them the opportunity to do what they said they were attempting to do. What we got is a one page -- one and a half page response from the CIA and some Xeroxes of newspaper articles, which we were already in possession of. I don't think they've been in compliance, and I don't even -- I don't believe that Ms.

Sharon has even said today that there's a valid government regulation. They cite Toohey which says if there is one, the government official can come in here and deny it. There has yet to be a statement by the government on any -- of any agency that there's a valid government regulation by which they may take themselves out of the purview of a subpoena that was issued by this Court.

THE COURT: We can, as Judges, sometimes by cajoling and bullying and pushing get things done that we know we can't do if push comes to shove, and push has come to shove and I'm not going to do something that doesn't -- that I can't enforce any further. This needs to come to an end.

I don't find there's any jurisdiction of a state court to hold a federal official in contempt for failing to respond to a state court's subpoena. And for that, and the other reasons stated by Ms. Sharon, the rule to show cause is dismissed.

MR. ROMANO: Your Honor, would you please note our exception?

THE COURT: Yes.

MR. ROMANO: For purposes of the record.

THE COURT: Of course.

APPENDIX EE

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

FILED

CRIMINAL

97 OCT -2 3:56

JOHN T. FREY

CLERK, CIRCUIT COURT

FAIRFAX, VA

COMMONWEALTH OF VIRGINIA

vs. CRIMINAL NO. 79148

MIR AIMAL KASI

MOTION FOR ORDER TO SHOW CAUSE

Defendant, Mir Aimal Kansi, through counsel, respectfully moves this Court for an order to be served upon the Custodian of Records for the Central Intelligence Agency, c/o CIA Headquarters, 930 Dolley Madison Blvd., McLean, Virginia, directing said Custodian to appear on October 15, 1997, at 10:00 a.m. to show cause why said Custodian should not be held in contempt for failing to respond to a subpoena duces tecum issued by this court and returnable to the Office of the Clerk of this Court on or before July 31, 1997 at 3:00 p.m.

Respectfully submitted,

MIR AIMAL KANSI

s/_____ By Counsel

Crystal A. Meleen

Senior Assistant Public Defender

4103 Chain Bridge Road, Suite 500

Fairfax, Virginia 22030

(703) 934-5600

CERTIFICATE OF SERVICE

I, Crystal A. Meleen, hereby certify that a copy of the above motion was served on this 2nd day of October, 1997 by hand delivery, to the office of Robert F. Horan, Jr., Esquire, Office of the Commonwealth's Attorney, 4100 Chain Bridge Road, Fairfax, Virginia, 22030.

s/_____

Crystal A. Meleen

Senior Assistant Public Defender

VIRGINIA
IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

vs. CRIMINAL NO. 79148

MIR AIMAL KASI

AFFIDAVIT

I, Crystal A. Meleen, Counsel for Mir Aimal Kansi, state as follows:

1. That on July 17,1997, I filed with this Court, a request for a subpoena duces tecum to be served on the Custodian or Records for the Central Intelligence Agency (CIA) requesting various records material to the defense of Mr. Kansi.

2. In response, I received a letter dated July 27, 1997 requesting a detailed description of the types of information requested by the subpoena. I compiled with the requested to the best of ability by letter dated August 20, 1997.

3. On September 16,1997, I received a letter dated September 12,1997 stating the CIA's refusal to comply with the Court's subpoena. The CIA has never filed any pleadings in this Court seeking to be relieved of its obligations under this Court's subpoena.

I hereby state that the aforementioned information is true to the best of my knowledge.

s/_____
Crystal A. Meleen
Senior Assistant Public Defender

STATE OF VIRGINIA) to wit:
COUNTY OF FAIRFAX)
Subscribed and sworn before me,
this 2nd day of October, 1997

s/_____
Joseph Keefe
Notary Public

My Commission Expires:
August 31, 2001

APPENDIX FF

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

FILED CRIMINAL
97 OCT – 2 PM 3:56
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

COMMONWEALTH OF VIRGINIA

vs. CRIMINAL NO. 79148

MIR AIMAL KASI

MOTION FOR AN ORDER TO SHOW CAUSE

Defendant, Mir Aimal Kansi, through counsel, respectfully moves this Court for an order to be served upon the Custodian of Records for the Federal Bureau of Investigation, 7799 Leesburg Pike, Falls Church, Virginia, directing said Custodian to appear on October 15, 1997, at 10:00 a.m. to show cause why said Custodian should not be held in contempt for failing to respond to a subpoena duces tecum issued by this court and returnable to the Office of the Clerk of this Court on or before July 31, 1997 at 3:00 p.m.

Respectfully submitted,
MIR AIMAL KANSI
By Counsel

s/_____

Crystal A. Meleen
Senior Assistant Public Defender
4103 Chain Bridge Road, Suite 500
Fairfax, Virginia 22030
(703) 934-5600

CERTIFICATE OF SERVICE

I, Crystal A. Meleen, hereby certify that a copy of the above motion was served on this 2nd day of October, 1997 by hand delivery, to the office of Robert F. Horan, Jr., Esquire, Office of the Commonwealth's Attorney, 4100 Chain Bridge Road, Fairfax, Virginia, 22030.

s/_____

Crystal A. Meleen

Senior Assistant Public Defender

VIRGINIA
IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

vs. CRIMINAL NO. 79148

MIR AIMAL KASI

AFFIDAVIT

I, Crystal A. Meleen, Counsel for Mir Aimal Kansi, state as follows:

1. That on July 17,1997, I filed with this Court, a request for a subpoena duces tecum to be served on the Custodian or Records for the Federal Bureau of Investigation (FBI), requesting various records material to the defense of Mr. Kansi.

2. In response, I received a letter dated July 24, 1997 requesting a detailed description of the types of information requested by the subpoena. I compiled with the requested to the best of ability by letter dated September 25, 1997.

3. The FBI has not filed with the Court or provided to counsel any records in response to this Court's subpoena. The FBI has never filed any pleadings in this Court seeking to be relieved of its obligations under this Court's subpoena.

I hereby state that the aforementioned information is true to the best of my knowledge.

s/_____
Crystal A. Meleen
Senior Assistant Public Defender

STATE OF VIRGINIA)
COUNTY OF FAIRFAX) to wit:

Subscribed and sworn before me,
this 2nd day of October, 1997

s/_____
Joseph Keefe
Notary Public

My Commission Expires:
August 31, 2001

APPENDIX GG

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

FILED
JUDICIAL SUPPORT
97 OCT 15 AM 8:06
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

COMMONWEALTH OF VIRGINIA

vs. CRIMINAL NO. 79148

MIR AIMAL KASI

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTIONS FOR ORDER TO SHOW CAUSE

On July 17, 1997, Mir Aimal Kansi, through counsel, filed requests for subpoenas duces tecum with the clerk of this court. The requested subpoenas duces tecum were issued and served on the custodians of record for the Central Intelligence Agency, 930 Dolley Madison Blvd., McLean, Virginia, the Federal Bureau of Investigation, 7799 Leesburg Pike, Falls Church, Virginia, and the Immigration and Naturalization Service, 4420 North Fairfax Drive, Arlington, Virginia.

The right of the accused in a criminal proceeding to compel witnesses and evidence is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Virginia Constitution require that the Court enforce that guarantee:

> The right to the production of all evidence at a criminal trial similarly has

> constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and to have compulsory process for obtaining witnesses in his favor." Moreover, the fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

United States v. Nixon, 418 U.S. 683, 711 (1974).

The Circuit Court's authority for issuance of subpoenas duces tecum to effectuate that constitutional right is found in Rule 3A:12 of the Rules of the Virginia Supreme Court. Section (d) of the same rule provides that "[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court to which the subpoena served upon him may be deemed a contempt of the court to which the subpoena is returnable." The Rule, on its face, makes no exception for federal agencies or agents of such agencies. If the custodian of records for a federal agency wishes to seek release from subpoena duces tecum, he must provide the court with "adequate excuse" as required by Rule 3A:12 (d).

To date, counsel for Mr. Kansi has received no documents filed with the court indicating that any of these agencies has provided "adequate excuse" or even objects to, or moves to quash, the subpoenas duces tecum. This Court's letter of October 3, 1997,

denying counsel's request for Rules to Show Cause suggests two notions which are unsupported by the record: 1) that the subpoenaed agencies are not willing to voluntarily comply, and 2) that this issue has previously been litigated to the detriment of the accused. Moreover, the language of the letter suggests that counsel has already moved this Court to hold the agency representatives in contempt. To the contrary, Mr. Kansi's motions seek the appearance of the custodians of record for determination by this Court as to whether findings of contempt are appropriate.

Documents of each of these federal agencies are subject to subpoena as evidenced by the Code of Federal Regulations which sets forth the procedure. See 28 C.R.R. §§ 16.21 et seq. (Department of Justice regulations for production of in federal and state proceedings); 32 C.F.R. §§ 1905.1 et seq. (Central Intelligence Agency regulations for production of official records in proceedings before federal, state or local government entities).

Each agency upon receipt of a subpoena duces tecum is required to act in accordance with agency regulations. The agency cannot simply ignore the subpoena. See 28 C.F.R. §§ 16.27, 16,28; 32 C.F.R. § 1905.4.

The doctrine of sovereign immunity has been invoked in support of the proposition that a federal employee may not be compelled to obey a subpoena contrary to his employer's instruction under valid agency regulations. United States ex rel. Touhy v. Ragen , 340 U.S. 462 (1951). A variety of cases following Touhy have relied upon this doctrine to dismiss contempt proceedings against federal officials for refusing to comply with state court subpoenas. None of these cases involves a

pending criminal case at the trial stage, the posture in which this case stands.

Touhy involved a habeas corpus proceeding. Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989), involved a tort action in a state court in West Virginia. Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986), dealt with an investigator from the NTSB, called to testify as an expert in a non-criminal proceeding. Reynolds Metals Co. v. Crowther, 572 F.Supp 288 (D. Mass. 1982), was a private civil action. Environmental Enterprises, Inc. v. Environmental Protection Agency, 664 F.Supp. 585 (D.D.C. 1987) was environmental litigation. Only State of Louisiana v. Sparks, 978 F.2d 226 (5th Cir. 1992) remotely implicates a criminal case, after conviction in defendant's motion for a new trial.

All of these cases implicate sovereign immunity, a common law doctrine designed to insulate the federal government against civil actions.

None of these cases weighs the common law doctrine of sovereign immunity against the specific constitutional right of the accused in a criminal proceeding to call for evidence.

In addition, in each of these cases, proceedings were initiated by the state court, at which federal officials appeared and interposed "cause" why they should not be held in contempt. In none did the trial court sua sponte refuse to issue the rule requested, anticipating the position of the official who was the subject of the proceeding. In each, the official responded to the subpoena by declining to appear and testify in response to it because his federal employer had refused to permit it.

None of the subpoenas at issue in this case has been the subject of a motion to quash; no federal official has informed this

Court that he/she has been directed not to comply with this court's subpoena. Letters have been written to defense counsel stating that the subpoenas are not enforceable; not even the letters themselves claim that the heads of the federal agencies involved have instructed the officials to whom the subpoenas were directed, not to comply with them.

WHEREFORE, Mir Aimal Kansi respectfully moves the Court to issue the requested Rules to Show Cause.

Respectfully submitted,

MIR AIMAL KANSI

By Counsel

OFFICE OF THE PUBLIC DEFENDER

s/ By: _____

Crystal A. Meleen
Senior Assistant Public Defender
4103 Chain Bridge Road, Suite 500
Fairfax, Virginia 22030
(703) 934-5600

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing memorandum was delivered on this 15th day of October, 1997, to Robert F. Horan, Jr., Commonwealth's Attorney.

s/_____

Crystal A. Meleen
Senior Assistant Public Defender

ATTACHMENTS HAVE BEEN EXCLUDED.

APPENDIX HH

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

vs. CRIMINAL NO. 79148

MIR AIMAL KASI

RESPONSE TOTHE RULE TO SHOW CAUSE AND TO THE SUBPOENA DUCES TECUM

The Central Intelligence Agency ("CIA") hereby responds to the Court's Rule to Show Cause and the subpoena duces tecum issued by the Circuit Court of Fairfax County as follows:

1. On July 18, 1997, at the request of defendant Mir Aimal Kansi, the Circuit Court of Fairfax County issued a subpoena directed to the CIA Custodian of Records seeking all material in each agency's possession relating to the investigation and apprehension of the defendant.

2. The CIA responded to counsel for defendant directly by letter dated on July 27, 1997.[7] See attachment A. The CIA also responded to the subpoena by filing a copy of the letter with the Clerk for Circuit Court of Fairfax County on the same date.

3. The CIA has, accordingly, responded to the subpoena duces tecum issued by the Circuit Court for Fairfax

---

[7] The July 27, 1997 letter explained that the subpoena duces tecum was jurisdictionally invalid. The letter also advised defendant that, outside of the subpoena context, it would consider a proper written request for information made pursuant to the CIA's regulations governing the production of documents by federal officials in connection with state or federal proceedings. 32 C.F.R. Part 1905.

County and the CIA custodian of records should, therefore, not be held in contempt.

4. To the extent the Court deems the July 27, 1997 letter filed with the Court insufficient to respond to the subpoena for purposes of the Rule to Show Cause, the CIA Custodian of Records should not be held in contempt because under the doctrine of sovereign immunity the circuit Court of Fairfax County does not have jurisdiction to enforce subpoenas or other demands compelling the production of documents by federal officials obtained or generated in the course of their official duties. See e.g. Louisiana v. Sparks, 978 F.2d 226, 234-36 (5th Cir. 1992); Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989); Environmental Enterprises, Inc. v. United States Environmental Protection Agency, 664 F.Supp. 585 (D.D.C. 1987). Similarly under the Touhy doctrine federal employees may not be held in contempt for complying with the agency's regulations governing the production of documents obtained or generated in the course of their official duties. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

5. For the Court's information, the defendant submitted a letter to the CIA pursuant to the aforementioned Touhy regulations on August 20, 1997. The CIA provided an interim response to the letter on September 12, 1997 and a [sic] anticipates a final response shortly.

For the foregoing reasons, the CIA has already responded to the subpoena duces tecum issued by the Circuit Court for Fairfax County and the CIA Custodian of Records should not be held in contempt.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
Civil Division
HELEN F. FAHEY
United States Attorney

s/ _____

ANNE L. WEISMANN
ANDREA M. SHARRIN
Attorneys
U.S. Department of Justice
Civil Division
901 E Street, N.W., Room 992
Washington, D.C. 2004
(202) 616-8268
(202) 616-8202

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of October, 1997, copies of the foregoing Response to the Rule to Show Cause and Subpoena Duces Tecum, by facsimile and first class mail, on:

Crystel [sic] A.Meleen
Senior Public Public [sic] Defender
4103 Chain Bridge Road, Suite 500
Fairfax, Virginia 22030

Robert F. Horan
Office of the Commonwealth's Attorney
4110 Chain Bridge Road, Room 124
Fairfax, Virginia 22030

s/_____
Andrea M. Sharrin

CENTRAL INTELLIGENCE AGENCY

Washington, D.C. 20506

Office of the General Counsel

27 July 1997

Crystal A. Maleen

Senior Assistant Public Defender

4102 Chain Bridge Road, Suite 500

Fairfax, Virginia 22030

Re: Commonwealth v. Kansi

Case No. KO79148

Dear Ms. Maleen:

The Central Intelligence Agency is in receipt of a subpoena duces tecum dated 18 July 1997 in the above-captioned matter. Please be aware that a state court subpoena is not enforceable against a federal agency. See, e.g. Louisiana v. Sparks, 978 F.2d 226, 234-36 (5th Cir. 1992); Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989); Environmental Enterprises, Inc. v. United States Environmental Protection Agency, 664 F.Supp. 585 (D.D.C. 1987). Accordingly, we are undertaking no action with respect to the subpoena.

The Supreme Court has upheld federal regulations con trolling the release of official information in litigation. United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). The Agency's Touhy regulation is published at 32 C.F.R. Part 1905 and a copy is enclosed for your information.

You may wish to consider a written request for CIA records that complies with our Touhy regulation. Such a request

should include a particularized statement of the specific information sought, why it is sought, and how it is relevant to the pending criminal litigation. Without waiving any of the requirements of our Touhy regulations, or the ability to assert any available privilege or rule of discovery to preclude production of CIA records, we would certainly consider any request that complies with our Touhy regulation.

If you have any further questions regarding this matter, you may contact me at (703) 874-3124.

Sincerely,

s/ Linda C. Cipriani
Attorney/Advisor

cc: John T. Frey
Clerk of the Court
Circuit Court of Fairfax County
Robert F. Horan
Commonwealth Attorney
Fairfax County

Part 1905 - PRODUCTION OF OFFICIAL RECORDS OR DISCLOSURE OF OFFICIAL INFORMATION IN PROCEEDINGS BEFORE FEDERALSTATE OR LOCAL GOVERNMENT ENTITIES OF COMPETENT JURISDICTION

Sec.

1905.1 Scope and Purpose

1905.2 Definitions

1905.3 General

1905.4 Procedure for Production

AUTHORITY: 5 U.S.C. 403(d)(3); 50 U.S.C. 403g; United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951); E.O. 12333 §§1.8(i), 1.5(h), 3.2;E.O. 12356; U.S. v. Snepp, 444 U.S. 507 (1980).

SOURCE: 56 FR 41459, August 21,1991, unless otherwise noted.

§ 1905.1 Scope and purpose.

This part sets forth the policy and procedures with respect to the production or disclosure of (a) material contained in the files of CIA, (b) information relating to or based upon material contained in the files of CIA, and (c) information acquired by any person while such person was an employee of CIA as part of the performance of that person's official duties or because of that person's association with CIA.

§ 1905.2 Definitions.

For the purpose of this part:

(a) *CIA or Agency* means the Central Intelligence Agency and includes all staff elements of the Director of Central Intelligence.

(b) *Demand* means any subpoena, order, or other legal summons (except garnishment orders) that is issued by a federal, state or local governmental entity of competent jurisdiction with the authority to require a response on a particular matter, or a request for appearance of an individual where a demand could issue.

(c) *Employee* means any officer, any staff, contract, or other employee of CIA; any person including independent contractors associated with or acting on behalf of CIA; and any person formerly having such a relationship with CIA.

(d) *Production or produce* means the disclosure of:

(1) Any material contained in the files of CIA; or

(2) Any information relating to material contained in the files of CIA, including but not limited to summaries of such information or material, or opinions based on such information or material;

(3) Any information acquired by persons while such persons were employees of CIA as part of the performance of their official duties or because of their official status or association with CIA;

in response to a demand upon an employee of CIA.

(e) *General Counsel* includes the Deputy General Counsel of Acting General Counsel.

§ 1905.3 General.

(a) No employee shall produce any materials or information in response to a demand without prior authorization as set forth in this part. This part applies to former employees to the extent consistent with applicable nondisclosure agreements.

(b) This part is intended only to provide procedures for responding to demands for production of documents or information, and is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable by any party against the United States.

§ 1905.4 Procedure for production.

(a) Whenever a demand for production is made upon an employee, the employee shall immediately notify the Litigation Division, Office of General Counsel, Central Intelligence Agency, Washington, DC 20505 (703/874-3118;which shall follow the procedures set forth in this section.

(b) The General Counsel of CIA and Deputy Directors of Heads of Independent Offices with responsibility for the information sought in the demand, or their designees, shall determine whether any information or materials may properly be produced in response to the demand, except that the Office of General Counsel may assert any and all legal defenses and objections to the demand available to CIA prior to the start of any search for information responsive to the demand. CIA may, in its sole discretion, decline to begin any search for information responsive to the demand until a final and non-appealable disposition of any such defenses and objections raised by CIA has been made by the entity or person that issued the demand.

(c) CIA officials shall consider the following factors, among others, in reaching a decision:

(1) Whether production is appropriate in light of any relevant privilege;

(2) Whether production is appropriate under the applicable rules of discovery or the procedures governing the case or matter in which the demand arose; and

(3) Whether any of the following circumstances apply:

(i) Disclosure would violate a statute, including but not limited to the Privacy Act of 1974, as amended, 5 U.S.C. 552a;

(ii) Disclosure would be inconsistent with the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods;

(iii) Disclosure would violate a specific CIA regulation or directive;

(iv) Disclosure would reveal classified information;

(v) Disclosure would improperly reveal trade secrets or proprietary confidential information without the owner's consent; or

(vi) Disclosure would unduly interfere with the orderly conduct of CIA's functions.

(d) If oral or written testimony is sought by a demand in a case or matter in which the CIA is not a party, a reasonably detailed description of the testimony sought, in the form of an affidavit, or if that is not feasible, a written statement, by the party seeking the testimony or by the party's attorney must be furnished to the CIA Office of General Counsel.

(e) The Office of General Counsel shall be responsible for notifying the appropriate employees and other persons of all

decisions regarding responses to demands and providing advice and counsel as to the implementation of such decisions.

(f) If response to a demand is required before a decision is made whether to provide the documents or information sought by the demand, an attorney from the Office of General Counsel, after consultation with the Department of Justice, shall appear before and furnish the court or other competent authority with a copy of this Regulation and state that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate CIA officials, and shall respectfully request the court or other authority to stay the demand pending receipt of the requested instructions.

(g) If the court of other authority declines to stay the demand pending receipt of instructions in response to a request made in accordance with § 1905.4(g), or rules that the demand must be complied with irrespective of instructions rendered in accordance with this part not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall, if so directed by the General Counsel of CIA, or designee, respectfully decline to comply with the demand under the authority of *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and this Regulation.

(h) With respect to any function granted to CIA officials in his part, such officials are authorized to delegate in writing their authority in any case or matter or category thereof to subordinate officials

(i) Any nonemployee who receives a demand for the production or disclosure of CIA information acquired because of that person's association or contacts with CIA should notify CIA's

Office of General Counsel, Litigation Division (703/874-3118) for guidance and assistance. In such cases the provisions of this regulation shall be applicable.

CENTRAL INTELLIGENCE AGENCY

Washington, D.C. 20506

Office of the General Counsel

27 July 1997

Crystal A. Maleen

Senior Assistant Public Defender

4102 Chain Bridge Road, Suite 500

Fairfax, Virginia 22030

Re: Commonwealth v. Kansi

Case No. KO79148

Dear Ms. Maleen:

The Central Intelligence Agency is in receipt of your 20 august 1997 letter requesting CIA records pursuant to 32 C.F.R. 1905 ("Touhy Regulations"). We do not wish to engage with you in a debate about the enforceability of state court subpoenas against a federal agency or shat CIA's Touhy regulations actually require. My letter to you of 27 July 1997 fully expressed our position on these matters. You should note that our decision to conduct some record searches for information responsive to your request is a voluntary one. 32 C.F.R. 1905.4.

Your letter sets out 18 categories of information you seek from this Agency, yet, as is pointed out below, you have not stated with sufficient specificity how each of those categories is relevant to a legal defense against the charges brought against your client. Moreover, some of the categories of information, specifically c, d, f, and l, are so broadly written that it is difficult to determine what

specific information you are seeking. Nevertheless, following is a response to your requests for information as best we understand them.

With regards to categories a, b, c, e, and g, these appear to be requests for information pertaining to the investigation into the 25 January 1993 shootings and the search for suspects. As these requests relate to a domestic U.S. law enforcement murder investigation, a mater not within CIA's charter, you may wish to direct these requests to the appropriate law enforcement agencies or to the Commonwealth Attorney as a discovery request pursuant to the Virginia Rules of Criminal Procedure. Nevertheless, CIA will conduct searches to locate documents responsive to your request. With specific regard to category b, we are limiting our search to any CIA records which identify someone other than your client as the alleged perpetrator of the murders. With respect to category c, we are interpreting your request to mean any tests conducted by or at the request of CIA relating to physical evidence of the murders. In agreeing to conduct searches, CIA is not agreeing to release to you any records that may be located, nor to subject itself to the jurisdiction of any non-federal court.

With regards to categories d, f, i, j, m, n, o, p, q, and r, these appear to request information collected by the Agency pertaining to your client or information pertaining to government efforts to find Kansi and bring him to the U.S. Because you have not provided sufficient explanation how this type of information, if it should exist in CIA records, is relevant to a defense to capital murder charges, we will not conduct searches for any responsive records. In denying your request on these grounds, I direct your

attention to §1905.4(c)(2) that production would not be appropriate under the applicable rules of discovery.

With respect to category h in which you request information that Kansi was in any connected to the CIA, Kansi has never had any involvement with this Agency. In sum, Kansi has never been a source or contact, whether informal or formal, of the Central Intelligence Agency.

Finally, with respect to category k in which you request any information about decisions made by CIA as to whether to violate the U.S. constitution, the laws of the United States or the provisions of any relevant treaties with respect to Mr. Kansi, we are not undertaking a search of CIA records. First, CIA is obligated to follow U.S. law when pursuing its intelligence mission. Second, with regard to your request concerning the laws of any other country or any relevant treaties, this request is overbroad, vague and without any showing of relevancy to a defense to capital murder.

I will contact you when our record searches for the remainder of your request are complete.

Sincerely,

s/ Linda C. Cipriani
Attorney-Advisor

APPENDIX II

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

FILED

IN COURTROOM

10/20/97

s/_____

(initials)

JOHN T. FREY

CLERK OF THE CIRCUIT COURT

OF FAIRFAX COUNTY, VA

COMMONWEALTH OF VIRGINIA

vs. CRIMINAL NO. 79148

MIR AIMAL KASI

RESPONSE TO THE RULE TO SHOW CAUSE AND

TO THE SUBPOENA DUCES TECUM

The Federal Bureau of Investigation ("FBI") and the Immigration and Naturalization Service ("INS") hereby respond to the Court's Rule to Show Cause and the subpoena duces tecum issued by the Circuit Court of Fairfax County as follows:

1. On July 18, 1997, at the request of defendant Mir Aimal Kansi, the Circuit Court of Fairfax County issued subpoena directed to the FBI Custodian of Records at both the Washington Metro Field office and the Northern Virginia Resident Agency seeking all material in each agency's possession relating to the investigation and apprehension of the defendant.

2. The INS has responded to the subpoena duces tecum with all documents in its possession that were not privileged, classified or otherwise not subject to disclosure under

its regulations. Accordingly, the INS has satisfied the subpoena in full . See Attachment A.

3. The FBI responded to counsel for defendant directly by letter dated on July 25, 1997. See attachment B. The government also advised defendant that, outside of the subpoena context, it would consider a written request for information made pursuant to the FBI's regulations governing the production of documents by federal officials in connection with state or federal proceedings. See 16 C.F.R. §§ 16.21-16.29. Defendant was advised that the regulations required a written request identifying with specificity the nature of the litigation, the specific information requested, and an explanation of how the information is relevant to the litigation. See Attachment B.

4. The FBI has, accordingly, responded to the subpoena duces tecum issued by the Circuit Court for Fairfax County and the FBI custodian of records should, therefore, not be held in contempt.

5. To the extent the Court deems the aforementioned responses by the INS or FBI insufficient to respond to the subpoena for purposes of the Rule to Show Cause, the FBI Custodian of records and the INS Custodian of Records should not be held in contempt because, under the doctrine of sovereign immunity, the Circuit Court of Fairfax County does not have jurisdiction to enforce subpoenas or other demands compelling the production of documents by federal officials obtained or generated in the course of their official duties. See e.g. Louisiana v. Sparks, 978 F.2d 226, 234-36 (5th Cir. 1992); Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989); Environmental Enterprises, Inc. v. United States Environmental Protection Agency, 664 F.Supp.

585 (D.D.C. 1987). Similarly under the Touhy doctrine federal employees may not be held in contempt for complying with the agency's regulations governing the production of documents obtained or generated in the course of their official duties. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

6. Although this Court lacks jurisdiction over this matter, for the Court's information, the defendant submitted a letter to the FBI pursuant to the aforementioned Touhy regulations on September 25,1997. The FBI is in the process of evaluating defendant's request. It also should be noted, however, that upon preliminary review it appears that most, if not all, of the material defendant requests may not be disclosed because, like the subpoenas, the categories defendant lists seek documents which are privileged, classified, would reveal investigatory records compiled for law enforcement purposes, would interfere with enforcement proceedings or disclose investigative techniques or procedures the effectiveness of which would be impaired if released, or would otherwise be inappropriate under the criminal discovery rules governing the case. See e.g., 16 C.F.R. § 16.26.

For the foregoing reasons, the INS and FBI have already responded to, and hereby further responds, to the subpoenas duces tecum issued by the Circuit Court for Fairfax County and the INS and FBI Custodians of Records should not be held in contempt.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
Civil Division
HELEN F. FAHEY
United States Attorney

s/_____
ANNE L. WEISMANN
ANDREA M. SHARRIN
Attorneys
U.S. Department of Justice
Civil Division
901 E Street, N.W., Room 992
Washington, D.C. 2004
(202) 616-8268
(202) 616-8202

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of October, 1997, copies of the foregoing Response to the Rule to Show Cause and Subpoena Duces Tecum, by facsimile and first class mail, on:

Crystal A. Meleen
Senior Public Defender
4103 Chain Bridge Road, Suite 500
Fairfax, Virginia 22030

Robert F. Horan
Office of the Commonwealth's Attorney
4110 Chain Bridge Road, Room 124
Fairfax, Virginia 22030

s/_____
Andrea M. Sharrin

U.S. Department of Justice

Immigration and Naturalization Service

4420 North Fairfax Drive

Arlington, VA 22209

October 14, 1997

Crystal A. Meleen, Esq.
Senior Assistant Public Defender
4103 Chain Bridge Road – Suite 500
Fairfax, VA 22030

Re: Commonwealth of Virginia v. Mir Aimal Kansi
Criminal No. 79148
Fairfax Country [sic] Circuit Court

Dear Ms. Meleen:

This will acknowledge receipt of your letter dated August 15, 1997, containing a "Supplemental Affidavit", executed by you on August 19, 1997, as well as a "Release of Information", executed by Mr. Kansi on the same date. These documents are in response to my letter of July 29, 1997, to you concerning your initial request for documents pursuant to a subpoena *duces tecum.*

I note that you have also filed a Freedom of Information Act request with the Washington District Office of the Immigration and Naturalization Service. That Unit has informed me that they were unable to locate your client's official file, but were able to locate a copy of your client's file and that they have forwarded that file, in its entirety, to you. (It was noted by that Unit in their transmittal letter to you that the copy located "may not be a complete copy of

his file nor . . . [a] current copy of his file . . . ." You were also advised that they would continue to search for the file).

It appears that you have now received all documents that the Washington District Office of the Immigration Service has relating to your client. As previously advised, the District will, nonetheless, continue to search for the file. Even though the FOIA Unit has forwarded to you all documents located to date relative to your client, the United States Department of Justice, and its component agencies, does not waive any claim it might have to sovereign immunity and/or any other right or rights it might have under the supremacy clause of the United States Constitution, federal statures and/or case law.

I am sorry it took this long to reply to you, but the search for the file, as well as being on detail to South Carolina for the past two weeks, caused this delay. I also must take exception to that pat of your letter, dated October 2nd which was received by me today, in which you state that you were unable to locate a telephone number for me in order to discuss this matter. I am surprised at this comment inasmuch as the concluding sentence of said July 29th letter to you states: "[i]f you have any questions, please feel free to call the undersigned at (202) 307-1579".

Sincerely,

HELEN F. FAHEY

United States Attorney

s/ By: MARTIN H. SACHS

Special Assist. U.S. Attorney

U.S. Department of Justice

Immigration and Naturalization Service

4420 North Fairfax Drive

Arlington, VA 22209

October 14, 1997

Crystal A. Meleen, Esq.

Senior Assistant Public Defender

4103 Chain Bridge Road – Suite 500

Fairfax, VA 22030

Re: Commonwealth of Virginia v. Mir Aimal Kansi

Criminal No. 79148

Fairfax Country [sic] Circuit Court

Dear Ms. Meleen:

This letter responds to the July 17, 1997 subpoenas directed to the Federal Bureau of Investigation ("FBI"), Custodian of Records at both the Washington Metro Field Office and the Northern Virginia Resident Agency and to various components of the United States Department of State ("State Department"). The subpoenas respectively seek documents, records and other material which may be in the FBI and State Department's possession in connection with the above-captioned criminal matter.

The FBI and State Department are both committed to responding to your request for information to the extent possible. To facilitate a prompt response, it is necessary for you to make a written request to each agency pursuant to the following regulations. The FBI's regulations, contained in 28 C.F.R. §§ 16.21-16.29, require that you provide a written statement identifying with specificity, the nature of the litigation, the specific

information requested and an explanation of how the information is relevant to the litigation. The information contained in your subpoena is not sufficiently detailed to be evaluated.

Similarly, the State Department regulations, contained in 22 C.F.R. § § 172.1-172.9, also require that you to describe with particularity the nature and relevancy of the information sought. See 22 C.F.R. § 172.5.

I should also note that the Circuit Court for Fairfax County does not have jurisdiction to enforce subpoenas compelling the production of documents by federal officials obtained or generated in the course of their official duties. See, e.g., Louisiana v. Sparks, 978 F.2d 226, 234-36 (5th Cir. 1992); Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989); Environmental Enterprises, Inc. v. United States Environmental Protection Agency, 664 F. Supp. 585 (D.D.C. 1987). For this reason, which is not exclusive, the FBI and the State Department object to the subpoena and decline to produce the documents, records or other material pursuant to it.

Please note, however, that the FBI and State Department are not objecting to your right to seek information but rather the form and specificity of the subpoenas. Thus, if you are still in receiving information, both agencies will willingly consider a proper written request which you should send directly to them.

I hope you find this information helpful. If you have any questions, I may be reached at (202) 616-8268.

Sincerely,

s/ Andrea M. Sharrin
Trial Attorney
Federal Programs Branch
Civil Division

APPENDIX JJ

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA CRIMINAL NO.: 79148

COUNTY OF FAIRFAX

RE: MIR AIMAL KANSI

To any Sheriff or Police Officer, Greeting:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, returned an indictment against MIR AIMAL KANSI for the charge of CAPITAL MURDER, 1ST DEGREE MURDER, MALICIOUS WOUNDING, MALICIOUS WOUNDING, MALICIOUS WOUNDING, USE/DISP FIERARM IN A FELONY, USE/DISP FIERARM IN A FELONY, USE/DISP FIREARM IN A FELONY, USE/DISP FIREARM IN A FELONY, USE/DISP FIREARM IN A FELONY, a copy of which is attached.

The Grand Jurors did return a true bill against MIR AIMAL KANSI, for the charge of CAPITAL MURDER, 1ST DEGREE MURDER, MALICIOUS WOUNDING, MALICIOUS WOUNDING, MALICIOUS WOUNDING, USE/DISP FIERARM IN A FELONY, USE/DISP FIERARM IN A FELONY, USE/DISP FIREARM IN A FELONY, USE/DISP FIREARM IN A FELONY, USE/DISP FIREARM IN A FELONY.

Therefore, in the name of the Commonwealth of Virginia, I command you to apprehend MIR AIMAL KANSI and bring him before the Judge of our Circuit Court of Fairfax County, Virginia,

FORTHWITH, to answer the indictment and to be further dealt with according to the law.

You are ORDERED to file a return reflecting how you have executed this Bench Warrant.

Given under my hand and seal of this Court on the 17th Day of February, 1993.

DEFENDANT TO BE HELD WITHOUT BOND UNTIL SET BY THE CIRCUIT COURT.

Trial date to be set by the Circuit Court.

s/_____

JUDGE J.HOWE BROWN

(EXECUTE AND RETURN THE ORIGINAL)

Executed this 17th day of June, 1997.

By: s/ Richard J. Cline #1787

Fairfax County Police

A COPY TESTE:

JOHN T. FREY, CLERK

By:_____

Deputy Clerk

Original retained in the office of

The Clerk of the Circuit Court of

Fairfax County, Virginia.

APPENDIX KK

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	:
-vs-	: CRIMINAL
	: CASE
	: NO. 79148
MIR AIMAL KASI, aka	:
MIR AIMAL KANSI	:
DEFENDANT	:

FAIRFAX COUNTY JUDICIAL CENTER

COURTROOM 5E

NOVEMBER 11, 1997

The above-entitled matter came on to be heard, with a Jury, before the HONORABLE J. HOWE BROWN, Judge, in and for the Circuit Court of Fairfax County, in the Courthouse, 4110 Chain Bridge Road, Fairfax, Virginia, beginning 9:04 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Robert F. Horan, Junior Esquire

Commonwealth's Attorney

Raymond Morrogh, Esquire

Deputy Commonwealth's Attorney

On Behalf of the Defendant:

Richard Goemann, Esquire

Frank Romano, Esquire

Crystal A. Meleen, Attorney at Law

Judith Barger, Attorney at Law

*****

CONTENTS

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
JUDY DARLING	42	–	–	–
RAHEL E. NATHANIAL	60	83	–	–
FLORENCE ARTHUR	90	96	–	–
SARFRAZ FAZALDIN	98	105	108	–
KHAN ASGHAR	110	115	–	–
NASIR ESHAI	117	121	–	–
CHRISTIAN MARCHETTI	125	132	–	–
LISA JOHNSON	136	140	–	–
LOUISA GILL	145	–	–	–
AMANULLAH KASI	151	173	181	–
MARY HANSHAW	185	192	–	–
ASAAD MOHAMMED	194	199	–	–
MIRWAIS KASI	203	225	227	–

EXHIBITS

	FOR IDENTIFICATION	IN EVIDENCE
COMMONWEALTH'S EXHIBIT NO. 48	PAGE 40	PAGE 40
COMMONWEALTH'S EXHIBIT NO. 49 --		PAGE 193
DEFENSE EXHIBIT NO. 1 --		PAGE 67
DEFENSE EXHIBIT NO. 2 --		PAGE 67
DEFENSE EXHIBIT NO. 3 --		PAGE 72
DEFENSE EXHIBIT NO. 4 --		PAGE 72
DEFENSE EXHIBIT NO. 5 --		PAGE 78
DEFENSE EXHIBIT NO. 6 --		PAGE 113
DEFENSE EXHIBIT NO. 7 --		PAGE 113
DEFENSE EXHIBIT NO. 8 --		PAGE 212
DEFENSE EXHIBIT NO. 10 --		PAGE 208
DEFENSE EXHIBIT NO. 12 --		PAGE 157
DEFENSE EXHIBIT NO. 13 --		PAGE 208
DEFENSE EXHIBIT NO. 14 --		PAGE 208
DEFENSE EXHIBIT NO. 15 --		PAGE 208
DEFENSE EXHIBIT NO. 16 --		PAGE 208
DEFENSE EXHIBIT NO. 17 --		PAGE 208
DEFENSE EXHIBIT NO. 18 --		PAGE 208
DEFENSE EXHIBIT NO. 19 --		PAGE 208
DEFENSE EXHIBIT NO. 20 --		PAGE 208

DEFENSE EXHIBIT NO. 21 --		PAGE 162
DEFENSE EXHIBIT NO. 25	PAGE 127	PAGE 128

DEFENSE EXHIBIT NO. 26 PAGE 188 PAGE 191
DEFENSE EXHIBIT NO. 27 PAGE 188 PAGE 191
DEFENSE EXHIBIT NO. 28 PAGE 188 PAGE 191
DEFENSE EXHIBIT NO. 29 PAGE 188 PAGE 191
DEFENSE EXHIBIT NO. 30A-B PAGE 189 --

MR. GOEMANN: The next witness, Your Honor, is

Mirwais Kasi.

May we have the Interpreter come forward. He would like to testify in English, but if he has any trouble, I've asked the Interpreter to stand by.

THE COURT: All right.

Whereupon,

ZEEBA SALEEM,

the Interpreter, was called by counsel for the Defendant to translate the testimony of the Witness, and, having first been duly sworn by the Clerk of the Court, translated the testimony of the Witness as follows:

Whereupon,

MIRWAIS KASI

a Witness, was called for examination by counsel on behalf of the Defendant, and, having first been duly sworn by the Clerk of the Court, was examined and testified through the above-named Interpreter as follows:

DIRECT EXAMINATION

BY MR. GOEMANN:

Q Sir, could you please tell the ladies and gentleman of the jury, your name and spell it for the court reporter.

A Mirwais Kasi; M-I-R-W-A-I-S K-A-S-I.

Q Where do you live?
A In Quetta, Pakistan.
Q Have you lived there all of your life?
A Yes.
Q What is your relationship to Mir Aimal Kasi?
A He's my brother.
Q What's the difference in your ages?
A Two years.
Q Now, has the City of Quetta -- has the physical surroundings, the buildings and the structures in Quetta changed much in the last ten years?
A No, not that much.
MR. GOEMANN: Your Honor, may I approach the witness?
THE COURT: Yes.
BY MR. GOEMANN:
Q Sir, I'm showing you what has been marked as Defense Exhibits 10, 13, 14, 15, 16, 17, 18, 19, and 20.
Would you just look through those and tell me when you're done.
A This is --
Q Do all the pictures show parts of Quetta?
A Yes.

Q You said you have lived there all of your life, right?

A Yes.

Q Do those pictures show fairly typical kinds of areas of Quetta?

A Yes, they do.

Q Is there anything particularly unique in any of the pictures?

A No.

Q Do the pictures fairly show Quetta as it was when Aimal was growing up?

A A little bit of changes of some buildings.

Q But, for the most part, it is the same?

A Yes.

MR. GOEMANN: Your Honor, I'd move those photographs into evidence.

THE COURT: May I see them; and is there an objection?

MR. HORAN: I don't know which ones he's actually offered. He's skipped from 10 to something else. Your Honor, I object on the grounds of relevance certainly.

There are pictures in there that clearly could

have been taken in the sixties. They have vehicles from the eighties in them.

Numbers 14, Number 19, Number 20, Number 16.

MR. GOEMANN: Your Honor, I never represented that they were taken in the sixties.

THE COURT: I think you all ought to come up here, so I can talk to you. Without looking at them, I don't know what they're -- there's a whole lot of different pictures.

TAKEN AT THE BENCH

THE COURT: I mean, what is 15 offered for?

MR. GOEMANN: Your Honor, all the pictures --

THE COURT: You don't have to keep it down. I'm just having you up here, because -- so we could look at the pictures.

MR. GOEMANN: All of the -- Mr. Kasi was raised in a culture very different than the United States and all the pictures are to show are to give an idea to the jury of how the town was like where he grew up in and what life like and the vast majority are just physical surroundings.

I certainly didn't mean to imply that they were taken in the sixties, but things have changed very

little in time. The fact is --

THE COURT: Well, I suspect that these (indicating) show that without -- what's the word when you put an automobile in the --

MR. GOEMANN: Anachronism?

THE COURT: Anachronism. And I'm -- I mean I'm not sure that these add anything and they are anachronistic and I don't know what that's (indicating) for.

MR. GOEMANN: Your Honor, I can elicit more testimony from this witness. These (indicating) are police officers and it's very typical for many years that the officers carry weapons like this (indicating).

THE COURT: I sustain the objection at this point for the purpose that you've offered so far as to 10.

And tell me why you need that (indicating) collection with the other collection; tell me what is unique about any of those that are the automobile's anachronistic points that Mr. Horan's talking about.

MR. GOEMANN: Your Honor, if that's the objection to it, I have no problem withdrawing these.

MR. HORAN: If you are going to allow those in, I withdraw any objection to any of them.

THE COURT: Say that again.

MR. HORAN: If you are going to allow those in, which show a very stilted picture of Pakistan, then I think -- and that's probably Pakistan today -- then I have no objection to the other ones coming in.

THE COURT: Okay, I'll let them all in so we'll get them all.

OPEN COURT

THE COURT: Including 10?

MR. HORAN: Including 10, Judge.

THE COURT: So we have admitted 10, 18, 17, 13, 16, 15, 14, 19, 20, and some of them have cars in it that are not yesterday's cars.

(The documents heretofore marked Defendant's Exhibit Nos. 10, 13, 14, 15, 16, 17, 18, 19, 20 for identification, were received in evidence.)

MR. HORAN: Your Honor, I wonder, could we at least -- someone knows when those pictures were taken. Could we at least have evidence of when they were taken?

MR. GOEMANN: Your Honor, I could not provide a witness right now, but we can certainly provide a

witness to say when they were taken.

MR. HORAN: I'll stipulate to it probably, if you will tell me what year they were taken.

MR. GOEMANN: They were taken in 1997.

MR. HORAN: All right.

THE COURT: Agreed they were taken in 1997?

MR. HORAN: They were taken in 1997. I'll stipulate to that.

THE COURT: And the witness' testimony with regard to the similarity.

BY MR. GOEMANN:

Q Sir, let me show you specifically Defense Exhibit No. 2, in evidence.

THE COURT: I don't think any of them are marked --

MR. GOEMANN: 10, I'm sorry.

THE COURT: Oh, 10, okay.

BY MR. GOEMANN:

Q Can you tell the ladies and gentlemen of the jury what Picture 10 shows?

A These are police officers of Pakistan.

A Are they police officers that are commonly found in Quetta?

A Yes.

Q The photograph shows the police officers with firearms at their sides; is that correct?

A Yes.

Q Were those firearms commonly used by police in Quetta?

A Yes.

Q Had they been commonly used by police in Quetta for many years as far as you know?

A For the last many years.

MR. GOEMANN: Your Honor, may I publish this to the Jury -- actually, may I publish all of them?

THE COURT: Yes.

(Whereupon, the aforesaid documents were published to the Jury.)

MR. GOEMANN:

Q Does your family have a home in Pakistan?

A Yes.

Q Is that in Quetta?

A Yes.

Q And -- let me just show you.

(Mr. Goemann handed a photograph to the Witness.)

Let me show you what has been marked as Defense Exhibit 8, for identification.

Is that a portion of your home in Pakistan?

A Yes.

Q What, specifically, does it show?

A This is -- the upper portion is of my elder brother and the lower portion belongs to Aimal.

Q When you say "Portion," what are you saying; a portion of what?

A A portion of the house. The upper story -- the upper story is my elder brother and the lower story is Aimal.

Q You are referring to your brother?

A Yes.

Q When was that house built?

A In 1983.

MR. GOEMANN: Your Honor, I'd move this in, Defense Exhibit 8.

THE COURT: Any objection to Exhibit 8?

MR. HORAN: No objection, Your Honor.

THE COURT: No. 8 will be received.

(The document heretofore marked Defendant's Exhibit No. 8 for identification, was received in evidence.)

MR. GOEMANN: Your Honor, I would like to publish 8 and I never published 6 and 7; photographs that were already in evidence.

(Whereupon, the aforesaid documents were published to the Jury.)

THE COURT: All right.

BY MR. GOEMANN:

Q Sir, what religion do you practice?

A Islam.

Q Is that also your brother's religion?

A Yes.

Q What was your father's name?

A The late Abdulah John Kasi.

Q He has passed away?

A Yes.

Q And what are your brother's names?

A My elder brother Amanullah Kasi. The second one which is elder Naseeb Ullah Kasi. Then Mirwais Kasi and after me Aimal Kasi.

Q The three elder brothers; Amanullah, Naseeb Ullah and yourself, did they all have the same mother?

A Yes.

Q And what about Aimal?

A Aimal is my second mother's child.

Q How old where you when you first have a memory of Aimal?

A Could you say question again.

Q Thinking back to when you were a child, when -- how old are you when you first remember anything about Aimal?

A That time when I remember, I was thirteen and Aimal was eleven when I remember him.

Q That's the first memory you have of him?

A Yes.

Q Now, can you tell the members of the jury what his personality was like at that time?

A His personality; I could explain that he was when I ever have seen him at that stage, crying too much, and teasing his mother.

And something like that.

Q When you say, "Teasing his mother," what do you mean?

A He teasing means that "I want this and I want this," and if the mother told him no -- for example, a toy or something like that, he would cry, cry and sometimes he would grab her by the hair or so.

Q That's something you remember from when he was younger?

A Yes.

Q Was that behavior different from the behavior of the other children in the family as far as you can remember?

A Yes. This was different.

Q In what way was the crying different than the other members of the family. The other children?

A The duration of his crying was more than the other children.

Q Did he get along with everyone in his family?

A Pardon me?

Q Did he get along? Did he have a good relationship with the other members of the family at this time?

A Yes.

Q As Aimal got older through the teenage years did you notice any change in his personality?

A Well, after that stage he became a little bit quiet and serious. Not -- I mean to say not talkative.

Q He was not talkative?

A Yes.

Q When you say he wasn't talkative, are you talking about him in relation to other members of the family?

Was he talkative to other members of the family or not?

A He used to talk less. I mean to say that he didn't mix up. He didn't mix up like other children. Like other brother and sister.

He was a little bit -- only he talked to a little bit.

Q He stayed separate?

A He -- to some extent.

Q What about friends, did he have a lot of friends outside of the family?

A No. He had no friends as far as I have seen. I have no -- I have not seen his friends.

Q During these teenage years, what would he do with his free time?

A When he was in the teenager, the free time we

have and outside the house we have shops and in one of the shops he used to sit in his free time with that bicycle repairing shop.

Q Did you ever see him there?

A Many times, yes.

Q What would he be doing?

A He was sitting and seeing the road and chatting with that -- the shop keeper.

Q Do you know approximately how old -- or how much older the shopkeeper was than Aimal, at that time?

A Well, I would say that he's double the age of Aimal.

Q He was at least double the age?

A Yes, he was at least double the age.

Q Do you know, at this time, if Aimal had any hobbies or interests?

A No. As far as his hobbies are concerned, I have seen no hobbies.

Q Now, during these teenage years, did you notice Aimal starting to engage in any kind of unusual behavior?

A As he became older, one thing which I noted and I told that he became quite serious, not talkative

like others and one change which I noted in him was he started talking with himself.

Sometimes when he came from the outside his hands were in this position (indicating) that he's talking to someone.

Q You're sure -- your hands are moving in front of you?

A Not the both hands, but only the one hand (indicating).

Q One hand; gesturing?

A Yes, gesturing that he is talking to someone.

Q And would you see his mouth moving at that time?

A Yes.

Q Did you ever hear anything he said?

A No. He was far from me when he was coming from outside, far from me.

Q Were there any times when this behavior was == well, did you see this behavior in any particular kind of setting?

A Yes. When I saw him in his room also some time, went into his room and after awhile, if he was not that much talkative and after some time if he -- he --

sometimes he seems alone and at that time he shook his head and talking to himself.

Q Did you go to the room when you saw him doing that?

A Yes.

Q Was there ever anyone else in the room?

A No.

Q When you saw that kind of behavior, do you know if Aimal was taken to doctors as a result of that behavior?

A He was taken in the childhood, which I don't remember, and we talked that it might be the at the time when he was --

MR. HORAN: Your Honor, I object to this. This is pure speculation by this witness.

MR. GOEMANN: Your Honor, I'll rephrase the question.

THE COURT: I sustain the objection to what he said in that little bit and you can rephrase the question.

BY MR. GOEMANN:

Q Do you know that during these teenage years, if your brother was taken to any doctors for this behavior?

A During this -- it was not that because he was not harmful in doing like shaking his head and talking to -- that he is talking to someone.

It was not that harmful.

Q So nobody took him to a doctor?

A Yeah.

Q Did there come some time when Aimal left for the United States?

A Pardon me?

Q Did there come a time when Aimal left Quetta to go to the United States?

A Yes.

Q And where were you when he left?

A I was for business to Lahore.

Q Now, as between the brothers, how would you characterize your relationship with Aimal when compared with the other brothers' relationship with him?

A Equal relationship.

Q Were you fairly close to him growing up?

A Just as I told, he not that much talkative to be close to him. I was close with him, yes, I'd say.

Q You said that -- I'm sorry, where were you when he left for the United Sates?

A I was in Lahore.

Q When you left to go to Lahore, did you know that Aimal was going to be -- going to be leaving Quetta before you came back?

A No. Only I knew that he was leaving. I didn't know the dates when he would be leaving. When I was back from Lahore, he had already left for the United States.

Q You didn't know that he was going to leave during the time you were away?

A Yes.

Q Yes, you did know or no, you didn't know? I'm sorry.

A I didn't know the actual date that he would be leaving.

Q Did you ever have any contact with Aimal while he was in the United States?

A Sometimes he used to bring to the house.

Q Did you have any indication that anything was wrong with him?

A No, not any indication.

Q Was there a time when he came back to Pakistan?

A Yes. He came back to Pakistan.
Q Was that 1993?
A Yes, 1993.
Q And were you in Quetta when he arrived?
A Yes. I was in Quetta when he arrived.
Q Can you describe his behavior at the time he arrived?
A We have not noted anything in his behavior. He was just as in past, serious. He was little bit more serious than before we saw him about two, two and a half years ago.
Q By serious you are talking about him being quiet?
A Being quiet, yes.
Q How long was he home?
A He was about four to five days.
Q And did you -- did he tell you -- did there come a point when he left Quetta?
A Pardon me?
Q Did there come a time when he left your home again?
A Yes.
Q Did he tell you that he was leaving?

A No. Before when he came he told us that he had come for a vacation and he will be leaving within a couple of days.

So without informing us, he went away.

Q As you were growing up, did your family have any firearms in the house?

A Yes.

Q What were they?

A They were shotgun, a pistol, a licensed one of my father.

Q And did your father use those firearms?

A The shotgun was for hunting and the pistol for self, for house protection.

Q Did Aimal ever use any of those firearms as far as you know?

A No. It wasn't -- it was under lock and key.

Q Did he ever show any interest in going hunting?

A No.

Q Did he ever show any interest in using the guns at all?

A No. They were locked.

Q Now, after your father passed away, did you

and your brothers inherit his business?

A Yes.

Q How much of the business did each of the sons inherit?

A We are four brothers and one-fourth to each brother.

Q Including Aimal?

A Including Aimal, yes.

Q Are you and your brothers active in running that business?

A Yes, we are.

Q At some point, did you try to get Aimal involved in running the business with the other brothers?

A Yes.

Q Do you remember about old he was at that time?

A He was in his -- as far as I remember, he was in his twenty-three or twenty-four.

Q Early twenties sometime?

A Yeah.

Q Were you successful in helping him into the business with the other brothers?

A No. He at the first -- at the early stage he was -- after his college in the evening time he used to

help in our business.

And after that when he had his master degree he had not that much interest in the business.

Q You said that Aimal was raised in the Islamic religion as you were; is that right?

A Yes.

Q Do you know of him ever being particularly orthodox or fervent in his religious beliefs?

A Pardon me?

Q Do you know of him ever being particularly orthodox or strict in his religious beliefs?

A No.

Q Do you know of him ever being involved in political activities?

A No, not in any political activities.

Q Did you ever know of him being in a political rally or a demonstration or anything like that?

A No, not at all.

Q Did you ever know him to be violent, get into fights?

A No, not at all.

Q When -- Aimal's mother was the second wife of your father; is that correct?

A That's right, yes.
Q Is she currently living?
A No.
Q When did she pass away?
A In 1983.
Q Did Aimal ever tell you that he hated the United States?
A No.
Q During the time that he was -- that you all were in Pakistan, do you know of him ever getting arrested or in trouble with the law?
A There in Pakistan?
Q Yes.
A No, not in any case.
MR. GOEMANN: I have nothing else, Your Honor.
THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. HORAN:
Q Do you know where he has been for the last four and a half years before he got caught on this offense?
A No.
Q Was in contact with you at all during that

time?

A No.

Q The picture, Defense Exhibit No. 10, of the policemen in the street; do you recall that picture?

A Yes. I have been to it.

Q What city is that picture taken in?

A This is Quetta.

Q This is in Quetta?

A Yes.

Q Those are travel policemen?

A Those are official provided by the -- these are government officials.

Q Government officers?

A Government officers.

Q They're federal officers.

A Yes.

Q Do you also have travel police in Quetta?

A No.

Q What kind of weapons are those that those officers have?

A These we call Klanshonkoff.

Q That's a Russian assault rifle?

A I don't know that it's Russian or which one,

but we call it Klanshonkoff.

Q But the police carry assault rifles?

A Yes, they do carry.

Q Mr. Kasi, how old are you?

A I am thirty-five years.

Q Thirty-five.

A Yes .

Q Did I understand you to say that the first that you remember your brother is when he was eleven?

A When he was eleven, yes, and I was thirteen?

Q So you would have been fifteen and he would have been eleven?

A Eleven.

Q Didn't you live with him the first eleven years?

A But as far as my memory works, I remember him when he was eleven.

Q I see.

You don't remember his life before he was eleven?

A No.

Q And at eleven you thought he cried too much?

A Yes, he cried too much.

Q And he would make too many demands on his mother?

A Yes, that's right.

Q I take it you thought that behavior was unusual?

A Unusual the duration of his crying; as well as his grabbing the hair of his mother. That was unusual.

Q Then within a couple of years he stopped crying as much?

A Yes.

Q And he stopped making demands on his mother?

A That's right.

Q When was the first time you ever saw him talk to himself?

A When he was a teenage; when he came to the teenage.

Q Thirteen, fourteen, fifteen; what age?

A Seventeen or eighteen.

Q When you would see him talk to himself, did you ask him why he was talking to himself?

A Yeah. He would laugh, "No, I was not talking."

Q He told you he wasn't talking to himself?

A Yes, but he was.
Q Did you argue with him about it?
A I told him when I asked him, "Who are you talking to, what are you doing?" He would said, "Nothing. I was not talking."
Q Do you remember how many times this happened?
A Yes. This process was continuing on; this process was.
Q From the time he was eighteen --
A Yeah.
Q -- until what time?
A Till he left for the United States.
Q He left for the United States when he was twenty-eight?
A Yeah; twenty-seven or twenty-eight.
Q Twenty-seven or twenty-eight?
A Yeah.
Q Were you living with him at the time he left to come to America?
A Pardon me?
Q Were you living in the same home with him, same house with him when he left to come to America?
A Yes, we have -- just as we saw in the

pictures, we have different portions -- our portions are different. We eat and drink together in that house, but our portions are divided.

Each brother have his own portion.

Q And the picture that you showed of the house, that's just one portion of that house?

A Yes.

Q It's a very large house and other members of the family live in other portions of the house?

A That's right.

Q And do you know how many rooms there are in that house?

A We each -- in each portion we have four bedrooms, including dining, including drawing and all the whole portion is of each brother.

Q So four brothers have four sections of the same house?

A Each brother with -- living with his children.

Q Was your brother playing soccer when he was growing up? Did he play soccer?

A I don't know what this.

THE INTERPRETER: Football.

THE WITNESS: No. He had no interest in.

BY MR. HORAN:

Q He never played football?

A No.

Q Were you in college when he was?

A I was in the college, but he was two years back in the class. Two years due to the difference.

Q Did you also go to the University of Baluchistan?

A Yes.

Q Did you see him often while you were at the University?

A No. When he was admitted at that time, I had finished.

Q You left the University when he came in?

A Yeah.

Q Did you ever see him at the University?

A Yes, quite many times.

Q Did you ever see him at the University with an AK-47?

A No.

Q Were you aware that he was there with an AK-47?

A No. No.

Q He left Pakistan in 1991; is that right?
A Yes. In the early 1991.
Q Prior to the time he came to the United States all for brothers received a part of the business; is that right?
A Yes.
Q You each had one-quarter of the business?
A That's right.
Q And that business is banking, commerce; what kind of business is it?
A Oh, we have hotels. We have -- we do construction work. We have orchards; lands, agricultural lands.
Q So it is a very large business?
A Yes.
Q It's a very diversified business; isn't that right?
A Pardon me?
Q It's a very diversified business; there are a lot of different parts to it?
A That's right.
Q And he has a one-fourth share of that business?

A Yes.
Q When he left for the United States, did he continue to be paid for his share of that business?
A No. He only -- he got his due share.
Q He got his share before he --
A Left for the United States.
Q And who got his share?
A He by himself got his share.
Q And he was paid --
A He was paid, yes. He was paid by my elder brother and my uncle.
Q And do you know how much they paid him?
A In our currency it was at that time twenty-two lakhs and at that time the dollar was about -- I think twenty-two rubes a dollar, so at that time, one-hundred thousand dollars.
Q So as of today, he no longer has a share of the business?
A No, he do have one-fourth share his.
Q He still has it?
A Yes.
Q But he doesn't get paid anything for it?
A Pardon me?

Q He doesn't get paid any more?
A (No response.)
Q If the business makes money, does he get money?
A Yes.
Q And how much money does he get annually?
A It -- well, it depends on the business and we have a joint business so we have not calculated the amount because it is joint.
Q During the whole time that he was in the United States he wasn't entitled to a share of the business; is that right?
A Pardon?
Q During the whole time that he is in the United States he still has a share of that business?
A Yes.
Q Do you recall when it was that he came back from Pakistan to the United States?
A It was early -- the beginning of 1993.
Q February of 1993?
A I don't remember the date. That it was the end of January or the beginning of February.
Q But it was somewhere in that time period?

A Yes. In that period.
Q Late January, early February?
A Or early February, yes, sir.
Q Now, you said at that time, when he came back he was more serious when he came back?
A Yes.
Q How did you know he was more serious?
A More serious as he was in the past not talking extra, not mix up with others. The same position, but a little difference in it.
Not that much when he used to talk at first. The duration of the time period of talking. It was lesser than he left for the United States.
Q And he stayed in the home in Quetta?
A Yes.
Q The one we have the picture of?
A Yes. He stayed in that portion.
Q And that remained his home the whole time he was in the United States?
A It's still waiting for him.
Q He stayed in that home for a couple of days and then he left?
A That's right.

Q Did he tell you he was leaving before he left?
A No.
Q Just one day he was gone?
A Yes.
Q And that was in February of 1993?
A Yes.
Q Did you ever hear from him at all between February of 1993, and the time that he was arrested?
A No.
Q Did you make any attempt to contact him?
A We didn't know that where he is; whether he's alive or not. After this incident which took place -- after the incident?
Q Yes.
A We didn't knew about him.
Q You didn't know where he was?
A Yes, that's right.
Q When was the next time you saw him after he left Quetta in '93?
A When I came here I had meeting with him in the Detention Center.
Q That would have been the next time?
A Yeah. That's the next time.

MR. HORAN: I have no further questions, Your Honor.

THE COURT: Anything on redirect?

MR. GOEMANN: Just a couple, Your Honor. Can I see Defense Exhibit 8?

(The Clerk of the Court handed the exhibit to Mr. Goemann.)

REDIRECT EXAMINATION

BY MR. GOEMANN:

Q Sir, showing you once again Defense Exhibit 8. That is a part of the family house; is that correct?

A Yes, it is.

Q When you talk about a portion, what -- how much of this house is an individual portion?

A You --

Q Let's turn it around and show the ladies and gentlemen of the jury.

A These stairs (indicating) going -- the stairs are going up to the upper portion of our elder brother and here (indicating) the downward steps, these are going to Aimal's portion.

Q Is it divided -- the upstairs and downstairs are two portions?

A Yes, they are separate. The entrance is separate. His entrance is separate and my elder brother's entrance is separate.

Q Where do you and your fourth brother live?

A We live on this side (indicating). The same as you see in this left hand (indicating) -- the same two portions on the right hand.

In the middle, we have a great garden and on the right side we have two portions consisting of the same two portions of my two brothers; I and my other brother.

Q So one of you lives on the downstairs and one on the upstairs in a house similar to that?

A That's right, yes.

Q Now, you said that Aimal still had a portion of the business while he was in the United States; is that right?

A Yes.

Q During that time period, were profits generated from the business that went to the brothers?

A No, just as I told before, we are joint family and joint family we -- whatever comes from the outside at that time we -- we, you know -- we share in the -- our father's business.

Q You put the money back in the business?

A In the business.

Q So, were any profits from that business ever sent to Aimal in the United States?

A No. He was not sent anything.

MR. GOEMANN: That's all, Your Honor.

THE COURT: May he be excused?

MR. GOEMANN: Yes, Your Honor.

THE COURT: You are excused and free to go or stay, as you wish. thank you.

(The Witness was excused.)

THE COURT: I suggest it is about time to go home. We are going to break for the evening.

APPENDIX LL

WASHINGTON POST

JUNE 18, 1997, Page A1

Suspect In CIA Slayings Is Returned To U.S.

Pakistani to Be Arraigned in Fairfax Today in '93 Shootings

By Robert O'Harrow, Jr.

Washington Post Staff Writer

Mir Aimal Kansi, the Pakistani native accused of killing two CIA employees and wounding three other people in a 1993 assault rifle attach outside the spy agency's Langley headquarters, has been captured and was returned on the United States last night, officials said.

FBI and CIA agents, working in a covert operation with the help of several Afghans, apparently lured Kansi out of hiding and took him into custody over the weekend near the border between Pakistan and Afghanistan according to sources familiar with the case.

An FBI official praised CIA efforts to set up the apprehension saying "This was people who get their hands dirty. Those guys busted their humps on this. They're doing what they do best."

Kansi, 33, was flown to the United States under extraordinary security on a military aircraft. He arrived at Dulles International Airport and was then transported by helicopter at 8:50 p.m. to the Fairfax County jail where sharpshooters kept watch from nearby rooftops.

He was taken into the jail in a police van. Sheriff's officials immediately began interviewing him to determine whether he was a suicide risk. Officials said Kansi would be held in

isolation for security reasons. "He's a very difficult custody issue," said Chief Deputy Sheriff James A. Vickery. "He's obviously a flight risk."

Kansi is scheduled to appear at 10 a.m. today in Fairfax Circuit Court, where he will be arraigned on two counts of capital murder, three counts of maiming and five counts of using a firearm in the commission of a felony. If convicted, he could receive the death penalty. The FBI arrested him on a federal warrant charging unlawful flight to avoid prosecution.

"We considered it a terrorist attach from the time it happened", Fairfax Commonwealth's Attorney Robert F. Horan Jr., who will prose-

See KANSI A10 Col. 3

Picture of Kansi: At left, Mir Aimal Kansi (with beard) is led to a van after arriving by helicopter at the Fairfax jail. He allegedly killed two CIA workers and wounded three other people.

Picture of Kansi: Above: a "wanted" poster shown Kansi, who was captured over the weekend near the border between Pakistan and Afghanistan by federal agents with the aid of Afghans.

Washington Post

July 18, 1997, Page A10

Suspect in Slayings Outside CIA Headquarters Is Returned to U.S.

Kansi from A1

cute the case, said at a news conference last night.

Several foreign governments and operatives played critical roles in moving Kansi into U.S. custody, officials said. They declined to say whether the CIA paid informants for the information they used to track him down or exactly how he was captured. The State Department had posted a $2 million reward for information on Kasi.

"It was decided at the highest levels of government that we will not reveal how he came into custody" one official said. Another official added, "It literally worked like clockwork".

Kansi is accused of opening fire with a Chinese-made AK-47 type assault weapon in CIA employees and others waiting in their cars at a stoplight outside CIA headquarters on Jan. 25, 1993. All but one of the five victims were CIA employees.

Family members of several of the victims said they were happy that Kansi has finally been brought to justice.

Andrew Bennett, the son of slain CIA analyst Lansing Bennett, 66, had been unaware of Kansi's arrest until a reporter reached him by phone last night at his home in Nantucket, Mass. "That's fantastic" Bennett exclaimed, "I just thought he would never be found. I'm shocked. I'm shaking."

Lansing Bennett's second wife, Inga of Reston, was walking her dog yesterday morning when the news came from the

CIA. She said that although the news of Kansi's arrest brings some relief, nothing can compensate her for her loss. "My husband is still dead," said Bennett, 50, "That's a permanent loss _____. Kansi's arrest doesn't bring this wonderful _____.

Bennett said that she was still waiting for details on how Kansi was captured and that she was eager to learn a motive for the attach, "Maybe we'll never know. Maybe like Timothy McVeigh, he will choose not to speak," she said, referring to the man convicted in the 1995 bombing of a federal building in Oklahoma City.

CIA employee Frank Darling, 28, also was killed in the attack. Two other CIA workers and another man sitting in his car were wounded.

Nicholas Starr, 65, a CIA employee was shot twice during the incident and has limited use of his left arm. He said he is pleased that Kansi will finally have to account for his actions.

"His being caught will not change my life. It won't bring back my arm, and it will not change the lives of anyone else who was affected," he said when reached at his Oakton home last night. "Still, we Americans hate to see people get away with murder."

Federal officials were jubilant about Kansi's apprehension yesterday, saying it brings to a close a wrenching case that underscored the nation's vulnerability to such attacks. Officials have said they believe Kansi acted alone.

At the time, Kansi's Reston roommate told police that shortly before the shootings, Kansi said that shortly before the shootings, Kansi had said that he was unhappy about the treatment of Muslims in Bosnia and that he wanted to "make a big

statement" by shooting up the CIA, the White House or the Israeli Embassy. Last night, officials played down that statement as a motive. Horan declined to say whether the roommate is still living in the United States.

Acting CIA Director George J. Tenet said Kansi's arrest "marks a clear triumph of good over evil."

"Today's developments in no way lessen the pain of those wounded on Jan. 25, 1993, nor the despair experienced by the families who lost a loved one, but it is my sincere hope that seeing Kansi brought to justice will provide some small solace." Tenet said. "We have always kept the faith and never wavered in our commitment to find the individual charged with this attack,"

Kansi's apprehension required a sensitive and complex covert law enforcement and counterterrorism operation that took "several days to complete" a senior Justice Department official said last night. The arrest involved a combination of sources developed by the FBI and CIA, officials said.

Kansi's arrest had been complicate by the fact that he has deep family ties to tribes that move among the rugged mountains along the Pakistani border. One assault on a complex where Kansi was suspected of hiding came up short. Other tips yielded few results.

Two years ago, Kansi was believed to have traveled from Karachi, Pakistan, though Baluchistan to Afghanistan, officials said. The CIA and FBI have been working for several years with several Afghan groups in anti-drug and anti-crime operations in that part of the world, and it was one of those groups that picked up Kansi, according to an administrative official.

This time, officials said, CIA agents made fruitful use of intelligence channels among several Afghans. Officials suggested that the agents created a ruse that drew Kansi out of hiding and put him off guard. Then FBI agents took him into custody, sources said.

An FBI team headed by Jimmy C. Carter, who oversees the Washington field office's criminal division, flew out of the country to pick up Kansi in the last several days, officials said. The team included the case agent who had been pursuing the Kansi investigation, a special hostage rescue unit based in Quantico and the "C-4" squad, a violent crime unit operating out of the Washington field office.

Kansi, a well-educated man who has a master's degree, arrived in the United States through New York's John F. Kennedy International Airport in 1991. He moved to Reston and slept on the apartment floor of another Pakistani immigrant, whom he knew through friends from his hometown of Quetta, Pakistan.

Over the next two years, Kansi lived in at least four homes in Loudoun and Fairfax counties, including his last residence in Reston with yet another Pakistani acquaintance. He worked for a couple of moving companies and a courier service.

In January 1993, Kansi apparently began preparing for the violent act officials said. From Jan. 10 to Jan. 22 he visited David Condon Guns in Chantilly four times to choose and then buy ammunition, two handguns, and a Colt AR-15 assault rifle, which he then exchanged for another AK-47 type rifle. He also bought a bullet-proof vest.

Shortly before 8 a.m. on Jan. 25, as commuters waited in the left-turn lanes on Dolley Madison Boulevard leading into the

CIA complex a man, who police say was Kansi jumped from a car. With an assault rifle in his hands, he walked between card methodically pulling the trigger.

Later that afternoon, Kansi bought a one-way plane ticket to Pakistan for $740 in cash from a store in Herndon. The next day, Kansi, wearing a sweater and slacks and carrying no luggage, traveled to National Airport and flew out of the area, according to law enforcement officials. He then caught a connecting flight out of the country.

Starr, one of the shooting victims, has kept a wanted poster of Kansi on his piano. He said the poster, a gift from a friend who works for the U.S. Postal Service was an "ironic" gesture. Now, he said, he hopes that Kansi will get what he deserves.

"I don't feel vindictive toward him," said Starr, who added that he has interest in attending Kansi's trial. "My hope is for justice."

Staff writers, Patricia Davis, Michael Dobbs, Wendy Melillo, Davis B. Ottaway, Walter Pincus, Leef Smith, and Pierre Thomas, contributed to this report.

SIDE BAR ARTICLE ON PAGE A10

CHRONOLOGY WITH MAP

MIR AIMAL KANSI CAPTURED

A four-year search for CIA shooting suspect Mir Aimal Kansi ended when a group of Afghans turned him over to U.S. officials, who flew him back to the United States yesterday for trial on capital murder charges.

Jan. 25, 1993: A man wielding an assault rifle emerges from a car and fires at other autos at a stoplight outside CIA headquarters in

Langley. Frank Darling, 28, and Lansing Bennett, 66, both CIA employees, are killed. Three others are seriously injured.

Jan. 26: Mir Aimal Kansi, a Pakistani national living in Reston, flees the United States and returns to his home city, Quetta, in Pakistan.

Feb. 10: Kansi is charged with the attack after an AK-47 type rifle and other evidence pointing to his involvement are found in his apartment.

Feb. 7, 1995: Ramzi Ahmed Yousef, suspected of building the bomb that detonated at the World Trade Center, is arrested in Islamabad, Pakistan. A colleague had alerted U.S. and Pakistani authorities to his whereabouts, apparently hoping to collect a $2 million reward offered by the U.S. government.

Feb. 8: Yousef is extradited to the United States for trial in New York.

Feb. 18: The FBI puts Kansi on its 10 Most Wanted list.

Feb. 22: Sen. Arlen Specter (R-Pa) chairman of the Senate Intelligence committee, urges President Clinton to classify Kansi as an "international terrorist" and increase the reward for information leading to his arrest to $2 million, from $200,000. He also writes to Pakistani Prime Minister Benazir Bhutto asking for Pakistan's help in apprehending Kansi.

March 31: The FBI informs the State Department that it has determined that the attack outside CIA headquarters was "an act of international terrorism".

April: The State Department prepares a statement announcing a $2 million reward but does not release it.

June 16: Judy Becker-Darling, widow of Frank Darling, is informed by the State Department that the statement will not be

released and that a massive publicity campaign has been postponed indefinitely because of the deteriorating security situation in Pakistan and increased threats there to the lives of American diplomats.

Oct. 2: The State Department announces that the reward has been increased to $2 million.

Yesterday: The FBI announces that Kansi has been arrested abroad after being turned over to U.S. official by a group of Afghans. He is flown to Dulles International Airport.

Today: Kansi is scheduled to appear in Fairfax County Circuit Court for a hearing on charges of capital murder.

APPENDIX MM

ARTICLE IN WASHINGTON POST ON JUNE 19, 1997 ON PAGES A10, A11

2 Governments Cloak Details of the Capture

By Thomas W. Lippman

Washington Post Staff Writer

Judging from the public pronouncements of U.S. officials yesterday, the law enforcement triumph represented by the capture of CIA shooting suspect Mir Aimal Kansi, did not occur in any particular place. It just happened in disembodies space somewhere.

In reality, Kansi was nabbed in Pakistan, according to a number of indications including an account by a U.S. official speaking on condition of anonymity. But that fact did not emerge from any formal statements or briefings here or in Islamabad. The two governments made a pact not to revel details of the operation, especially not where it occurred.

Accordingly to law enforcement sources and specialists in South Asian affairs, that caution is understandable for two reasons.

First, both countries naturally want to avoid disclosure of information that would reveal how they learned Kansi's whereabouts. They wanted in part to protect the people who handed him over from possible vengeance of his kinsmen in the remote Pakistan-Afghanistan border area.

Second, it is a matter of considerable political sensitivity in Muslim Pakistan to allow delivery of one of its citizens into the hands of the United States. Pakistan and the United States were close allies during the Cold War when Pakistan was Washington's instrument for building up the armed resistance to Soviet troops in

Afghanistan, but many Pakistanis feel the United States abandoned them when their country was no longer useful.

Relations between the two countries have varied from warm to chilly over the past few years. Washington developed a list of grievances against Pakistan and Pakistan sought to regain Washington's favor while pursuing its independent course on security issues including acquisition of missiles from China and continuation of its nuclear weapons program.

"One reason they would want to be helpful [with Kansi] is that there are a bunch of other issues on which we disagree, like the nukes and the missiles" said Michael Kreon, president of the Stimson Center here who watches Pakistan closely. "It's good to have some countervailing positives."

"All we are allowed to say is that we cannot comment on any specific incident, but we have been cooperating with the United States on international terrorism for some time," said Zamir Akram, a senior diplomat at Pakistan's embassy here.

Kansi is accused of the Jan. 25, 1993 shooting spree outside CIA headquarters in Langley that killed two agency employees and wounded three other people. He fled the United States and has long been believed to have returned to his native Baluchistan, a loosely governed region of Pakistan near the Afghan and Iranian borders where tribal leaders are the real government.

Pakistani governments are generally reluctant to take actions that stir animosity in that region but their caution was overridden in the Kansi case by the desire to improve with Washington. In June 1993, the Pakistani army raided the Kansi family compound, after FBI and CIA teams heard he was in the area.

At that time Kansi eluded capture and was later believed to have moved across the border into Afghanistan, where the United States recognizes no government. Specialists in the region's affairs said yesterday it was likely that Afghans or Pakistanis with no family ties to Kansi turned him in hoping to collect a $2 million reward offered by the State Department.

"Kansi got to an area where $2 million is worth more than clan loyalty, " said Robert Oakley, former U.S. ambassador to Pakistan.

Oakley and others also said Pakistan's ISI intelligence service which developed close ties with the CIA during the war in Afghanistan can be assumed to have helped track down Kansi.

But sources in Pakistan indicated the government there was reluctant to allow the arrest and permitted it only under U.S. pressure which State Department spokesman Nicholas Burns—without confirming that Pakistan was the target—indicated was intense.

"Since it was an American operation, we are in the dark," a Pakistani Interior Ministry official told Washington Post correspondent Kenneth Cooper.

Pakistan has been chafing for years under the impact of a U.S. law that cut off military aid and sales to Pakistan because the country refused to abandon its nuclear weapons program. Because of that law, Pakistan has been unable to take delivery of a fleet of F-16 warplanes for which it paid $658 million or to get back the money.

Partly to overcome the hostility in Congress, Pakistan has cooperated on some major law enforcement cases including the February, 1995 capture of World Trade Center bombing suspect

Ramzi Yousef. But U.S. officials are unhappy that no one has been arrested in the March 1995 slaying of two employees of the U.S. Consulate in Karachi.

Staff writer Walter Pincus contributed to this report.

Planning the final phase of the operation, Carter and his team decided to make the arrest late at night. That would ensure as much secrecy as possible and it was hoped, give them the element of surprise.

"This was the kind of place that any stranger would be noticed in immediately," Carter said.

Shortly before 4 a.m. Sunday, Carter and the team drove their four-wheel drive vehicle near the hotel. Seconds later, the team led by Carter and Garrett moved up the stairs.

Then they knocked on Kansi's door.

"He looked very surprised," Carter said. "But we were waking him up in the middle of the night."

Within seconds, Kansi was on the floor, and in handcuffs. After he swore briefly, Carter and the agents told him to be quiet. Aware of the guns and the agents' intent, he obliged. After confirming Kansi's identification, the agents left his room within 10 minutes.

But the arrest was only part of the job. Now they had to get him back to the United States. Traveling discreetly, the agents spent a little more than a day moving Kansi toward a location they decline to disclose. Kansi by this time "was comfortable and chatty," Carter said.

A senior FBI official said yesterday that Kansi was in the custody of the FBI arrest team throughout this period and that no foreign law enforcement officers ever had charge of him.

Details were sketchy but Pakistani sources said that Kansi departed their country through a section of the Islamabad airport controlled by the Pakistani air force.

Sometime Monday agents reached their destination: a gigantic C-141 Starlifter airplane 168 feet in length, painted in camouflage colors with a U.S. flag on its rear wing. The military officials on board had no idea who they were transporting "and they didn't ask." Carter said.

A short while later, Pickard who was traveling home from a visit in New York to visit his parents for Father's day, received an electronic page from FBI headquarters.

"They said the package had been delivered," Pickard said.

As the engines roared and the plane taxied toward the runway, Carter, who had celebrated his birthday during the operation, finally began to relax. "It was the best looking taxi I'd ever seen in my life," he said. "You knew you were going home."

Staff writers Kenneth J. Cooper in New Delhi and Peter Baker contributed to this report.

APPENDIX NN

Article in Washington Post on June 19, 1997

Pages A12, A13

SUSPECT'S MOVES, MOTIVE REMAIN MYSTERIOUS

KANSI LEFT LIFE OF PRIVILEGE TO MOVE TO U.S.

Kansi is part of a politically powerful family.

By David B. Ottaway

Washington Post Staff Writer

Mir Aimal Kansi, charged with murdering two CIA employees, comes from a wealthy, landowning family in rugged western Pakistan, where he led a life of relative affluence and leisure before abruptly moving to the Untied States in February 1991 as an illegal immigrant and drifter.

U.S. law enforcement officials hope that their interrogations of Kansi, who was returned to the United States Tuesday night after his capture, will resolve a four-year mystery: why this privileged young man spurned a silver-spoon birthright and a promising career at home to allegedly commit what the FBI has described as "an act of international terrorism in the assault-rifle attack outside CIA headquarters in 1993.

Now 33, Kansi is part of a politically powerful family from the Pashtun tribe in Quetta, Pakistan. According to interviews with family members, friends and part associates, the Kansi family owns an entire downtown block and two hotels, as well as various businesses and orchards outside the provincial capital of Baluchistan which borders Afghanistan.

Kansi attended the city's best private schools before going to the University of Baluchistan, where he majored in English literature. When his father died in 1989, the same year Kansi

graduated from the university, he inherited $100,000 in cash and much of his father's real estate and business ventures, friends and family members.

How Kansi wound up adrift in the United States less than two years later, allegedly plotting a murderous attack, appears to remain a mystery, even to his family. One theory holds that Kansi bore a grudge against the CIA as a result of his family's alleged involvement in smuggling U.S. provided arms to rebels fighting to drive Soviet troops out of Afghanistan in the 1980's.

Some press accounts have alleged that Kansi's father, Abdullah Kansi worked for the CIA and helped the agency in its covert gun-running operation. Quetta was one of the main staging areas for arms delivered to the Afghan rebels. After Malik Gul Hasan Kansi, a relative of the accused killer, was mysteriously shot to death in Quetta in June 1984, local reports subsequently speculated that he might have been assassinated by CIA agents for reasons connected to the Afghan operation. Those arms deliveries began in earnest in 1985. The killers were never apprehended.

The CIA, after conducting what it says was a thorough internal review, had denied that any member of the Kansi family had agency connections.

According to some media accounts, several members of the Kansi family actually worked for Pakistan's Inter-Services Intelligence (ISI), the agency the CIA relied upon to help transport and distribute arms to the Afghan rebels.

Kansi grew up at a time when the joint U.S.-Pakistani operation against the Soviet occupation in Afghanistan was in full swing and his fellow Pashtun tribesmen—who make up the majority in Afghanistan—were involved in a bloody, escalating

was against Moscow. Many Pashtun, however, supported the Soviet-backed communist regime in Kabul.

The search for explanations of Kansi's actions have led the CIA, FBI and various journalists to examine his background for clues to a possible anti-American streak.

A reporter for the New Yorker magazine, Mary Anne Weaver, discovered during a visit to Quetta in 1995, that Kansi, at the age of 8, had fought with one of his teachers and then burned down the school with the help of family servants. He apparently was never punished for the misdeed.

Other reports say Kansi, while a university student, became swept up in a Pashtun nationalist movement, which had a distinctly anti-American aspect to it. The Pakistani government sought to suppress the movement at a time when the United States was Pakistan's closest ally. On several occasions, Kansi reportedly participated in demonstrations where the U.S. flag was burned and "Death to America" placards were used.

But most accounts do not portray Kansi as a political firebrand during his youth. Based on interviews with Kansi's family, friends, and former schoolmates in 1993, two Washington Post reporters found him to have been a mostly apathetic student who was usually shy and somewhat naive, but also subject to occasional aggressive outbursts. He sometimes resorted to threats and intimidation to try to get higher school grades, according to his university teachers. He also took to carrying anAK-47 automatic rifle to school after the anti-communist rebellion broke out in Afghanistan in 1990.

Family members said Kansi's father's death in 1989 from a heart attach, just as he was graduated from university at the age

of 25, had a deeply emotional impact on him although the full repercussions of the event remain unclear. The following year, Kansi went to Germany for reasons his family and friends in Quetta never understood, and stayed there for several months. He returned to Quetta in late 1990, only to leave again the following February for the United States.

Kansi skipped through U.S. Customs, evidently without being questioned by immigration officials. He remained in the country illegally until February 1992, when he was discovered and quickly applied for political asylum. Kansi was allowed to stay under a general immigration amnesty and received a work visa.

Supreme Court, U.S.
FILED
MAY 28 1999
CLERK

No. 98-1812

In The

Supreme Court of the United States

MIR AIMAL KASI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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33pp

QUESTIONS PRESENTED

1. Is there any compelling reason to review the Virginia Supreme Court's fact-specific application of this Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), to a case where, at the time of his seizure in Pakistan in June of 1997, the petitioner was a non-resident alien who had fled the United States in January of 1993 to escape prosecution for murder and had abandoned any previous connection with this country?

2. Is there any compelling reason to review the Virginia Supreme Court's fact-specific application of the rule established by this Court in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)?

3. Is there any compelling reason to review the Virginia Supreme Court's fact-bound rejection of petitioner's claim that an alleged violation of the Vienna Convention on Consular Relations requires the suppression of his confession?

4. Is petitioner's so-called "*Touhy*" claim defaulted and barred from review?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS WHY THE WRIT SHOULD BE DENIED .. 6

I. THE VIRGINIA SUPREME COURT CORRECTLY RULED THAT THE FOURTH AMENDMENT DID NOT APPLY TO PETITIONER BECAUSE AT THE TIME OF THE CHALLENGED SEIZURE HE WAS A NONRESIDENT ALIEN WHO HAD FLED THE UNITED STATES MORE THAN FOUR YEARS PREVIOUS IN ORDER TO ESCAPE PROSECUTION FOR THE MURDER OF UNITED STATES CITIZENS 6

II. THE COURT BELOW CORRECTLY APPLIED *ALVAREZ-MACHAIN* AND CONCLUDED THAT THE TRIAL COURT WAS NOT DEPRIVED OF JURISDICTION OVER PETITIONER BY VIRTUE OF THE MANNER IN WHICH HE WAS SEIZED AND BROUGHT TO THE UNITED STATES 10

III. THERE WAS NO "VIENNA CONVENTION" VIOLATION IN PETITIONER'S CASE AND, EVEN IF THERE WERE, THERE WOULD BE NO CONSTITUTIONAL BASIS FOR REQUIRING THE SUPPRESSION OF HIS CONFESSION IN A STATE CRIMINAL TRIAL 12

IV. PETITIONER DID NOT RAISE HIS SO-CALLED *"TOUHY"* CLAIM IN THE VIRGINIA SUPREME COURT 19

CONCLUSION 22

RESPONDENT'S APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Black v. Cutter Laboratories, 351 U.S. 293 (1956) ...21, 22

Breard v. Greene, 118 S.Ct. 1352 (1998) 14, 15, 17

Kasi v. Commonwealth, 508 S.E.2d 57 (Va. 1998) .. *passim*

Ker v. Illinois, 119 U.S. 436 (1886) 11

Mansell v. Mansell, 490 U.S. 581 (1989) 21

Michigan v. Tucker, 417 U.S. 433 (1974) 18

Miranda v. Arizona, 384 U.S. 436 (1966) 5

Murphy v. Netherland, 116 F.3d 97 (4th Cir.), *cert. denied*, 521 U.S. 1144 (1997) 17

Reichmann v. State, 581 So.2d 133 (Fla. 1991) 7, 9

Sheppard v. Commonwealth, 464 S.E.2d 131 (Va. 1995), *cert. denied*, 517 U.S. 1110 (1996) 20

United States v. $69,530, 22 F. Supp. 2d 587 (W.D. Texas 1998) 18

United States v. Adamaj, 170 F.3d 58 (1st Cir. 1999) 18

United States v. Alvarez-Machain, 504 U.S. 655 (1992) 10, 11, 12

United States v. Barona, 56 F.3d 1087 (9th Cir. 1995) ..9, 10

United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1999 U.S. Dist. LEXIS 2640 (D.C. Ill. 1999) 16

United States v. Chen, ___ F. Supp. 2d ___, 1999 U.S. Dist. LEXIS 5728 (S.D. N.Y. 1999) 16

United States v. Esparza-Ponce, 7 F. Supp. 2d 1084 (S.D. Cal. 1998) 16, 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Juda, 46 F.3d 961 (9th Cir. 1995) 7, 9

United States v. Juda, 797 F. Supp. 774 (N.D. Cal. 1992) 9

United States v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999) 16

United States v. Tapia-Mendoza, ___ F. Supp. 2d ___, 1999 U.S. Dist. LEXIS 2852 (D. Utah 1999) 16

United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) 19, 21

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 7, 8, 9, 10

Withrow v. Williams, 507 U.S. 680 (1993) 18

Yee v. Escondido, 503 U.S. 519 (1992).....19, 21

OTHER AUTHORITY

§ 19.2-264.4, Code of Virginia 1

U.S. Sup. Ct. Rule 10 .....7, 10

U.S. Sup. Ct. Rule 14.1(g)(i)..... 19

Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820 (Apr. 24, 1963)..... 12

STATEMENT OF THE CASE

On November 10, 1997, after a six-day trial, a jury in the Circuit Court of Fairfax County, Virginia, convicted the petitioner, Mir Aimal Kasi, of the capital murder of Frank Darling, the first-degree murder of Dr. Lansing Bennett, the malicious shootings of Nicholas Starr, Calvin Morgan and Stephen Williams, and the use of a firearm in each of those five offenses. On the first-degree murder conviction, the jury fixed Kasi's punishment at life imprisonment and a $100,000 fine. On each of the three malicious shooting convictions, the jury fixed punishment at 20 years imprisonment and a fine of $100,000. Kasi's punishment for the first firearms conviction was two years and four years for each of the other four convictions.

On November 14, 1997, after a separate three-day proceeding on the issue of punishment for the capital murder, the jury fixed petitioner's punishment at death based upon a finding beyond a reasonable doubt that his offense was "outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." *See* Va. Code § 19.2-264.4. On January 23, 1998, after considering a presentence report, the trial court sentenced Kasi in accordance with the jury's verdicts. Final judgment was entered by order dated February 4, 1998.

On November 6, 1998, the Supreme Court of Virginia unanimously affirmed Kasi's convictions and sentences. *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998). The state court also ruled that Kasi's appeal with respect to his

non-capital convictions had not been perfected. *Id.* at 60. Kasi's petition for rehearing was denied on January 8, 1999.

STATEMENT OF FACTS[1]

On Monday, January 25, 1993, near 8:00 a.m., a number of automobiles were stopped in two north-bound, left-turn lanes on Route 123 in Fairfax County at the main entrance to the headquarters of the Central Intelligence Agency (CIA). The vehicle operators had stopped for a red traffic light and were waiting to turn into the entrance.

At the same time, a lone gunman emerged from another vehicle, which he had stopped behind the automobiles. The gunman, armed with an AK-47 assault rifle, proceeded to move among the automobiles firing the weapon into them. Within a few seconds, Frank Darling and Lansing Bennett were killed and Nicholas Starr, Calvin Morgan, and Stephen Williams were wounded by the gunshots. All the victims were CIA employees and were operators of separate automobiles. The gunman, later identified as defendant Mir Aimal Kasi, also known as Mir Aimal Kansi, fled the scene.

At this time, defendant, a native of Pakistan, was residing in an apartment in Reston with a friend, Zahed Mir. Defendant was employed as a driver for a local courier service and was

[1] The facts are taken verbatim from the Virginia Supreme Court's opinion. *Kasi*, 508 S.E.2d at 59-62. (Ptn. App. 1-2, 5-8).

familiar with the area surrounding the CIA entrance.

The day after the shootings, defendant returned to Pakistan. Two days later, Mir reported to the police that defendant was a "missing person."

On February 8, 1993, the police searched Mir's apartment and discovered the weapon used in the shootings as well as other property of defendant. Defendant had purchased the weapon in Fairfax County three days prior to commission of the crimes.

On February 16, 1993, defendant was indicted for the following offenses arising from the events of January 25th: Capital murder of Darling as part of the same act that killed Bennett, Code § 18.2-31(7); murder of Bennett, Code § 18.2-32; malicious woundings of Starr, Morgan, and Williams, Code § 18.2-51; and five charges of using a firearm in commission of the foregoing felonies, Code § 18.2-53.1.

Nearly four and one-half years later, on June 15, 1997, agents of the Federal Bureau of Investigation (FBI) apprehended defendant in a hotel room in Pakistan. Defendant had been traveling in Afghanistan during the entire period, except for brief visits to Pakistan.

* * *

Near 4:00 a.m. on June 15, 1997, Agent Garrett and three other armed FBI agents, dressed in "native clothing," apprehended defendant in a hotel room in Pakistan. Defendant responded to a knock on the room's door and the agents rushed inside. Defendant, who has "a master's degree in English," immediately began screaming in a foreign language and refused to identify

himself. After a few minutes, defendant was subdued, handcuffed, and gagged. Garrett identified him through the use of fingerprints. During the scuffle, defendant sustained "minor lacerations" to his arm and back.

When the agents left the hotel with defendant in custody, he was handcuffed and shackled, and a hood had been placed over his head. He was transported in a vehicle for about an hour to board an airplane. During the trip, Garrett told defendant he was an FBI agent.

The ensuing flight lasted "a little over an hour." After the plane landed, defendant was transferred to a vehicle and driven for about 40 minutes to a "holding facility" where he was turned over to Pakistani authorities. The FBI agents removed defendant's handcuffs, shackles, and hood when the group arrived at the holding facility, but the persons in charge of the facility put other handcuffs on him. Defendant was placed in one of the eight cells in the facility, where he remained until the morning of June 17.

During defendant's stay in the facility, the FBI agents never left his presence or allowed him to be interrogated or "harassed." He was allowed to eat, drink, and sleep. On two occasions, the agents removed defendant from his cell to "look at his back and look at his arm" and to take his blood pressure and pulse. The agents did not interrogate defendant in the holding facility and made certain he was treated "fairly and humanely."

On June 16, "late in the day," Garrett was advised by an official at the U.S. Embassy in Pakistan that defendant would be "released" the

next morning. On June 17 near 7:00 a.m., defendant "was allowed to be released" from the facility in the custody of the FBI agents. He was handcuffed, shackled, and hooded during a 15-minute ride to an airplane. Once on the plane, the hood was removed. Shortly after boarding the aircraft, a physician checked defendant's "well being."

During the 12-hour flight to Fairfax County, Garrett first conducted a "background" conversation with defendant, discussing "his life in the United States, where he lived, where he worked." Garrett knew, from his four-and-one-half-year search for defendant, that he was a Pakistani national. Defendant was not a U.S. citizen and he had not returned to the United States after he fled on January 26, 1993.

After the background conversation, Garrett advised defendant of rights according to *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant signed an FBI "Advice of Rights" form, after reading it and having it explained to him. He indicated he was waiving his rights and was willing to give a statement. The subsequent interview lasted about one and one-half hours before defendant signed a written statement summarizing the interview.

In the written statement, defendant confirmed he purchased the AK-47 rifle and about 150 rounds of ammunition several days before the incident in question. He said he drove his pickup truck to the scene, "got out of my vehicle & started shooting into vehicles stopped at a red light." Continuing, he stated that "I shot approximately 10 rounds shooting 5 people. I aimed for the chest area of the people I shot. I

then returned to my truck & drove back to my apartment." He also stated that "several days before the shooting I decided to do the shooting at the CIA or the Israeli Embassy but decided to shoot at the CIA because it was easier because CIA officials are not armed."

As part of his oral statement to Garrett, defendant enumerated political reasons "why he wanted to do this shooting." He said he was "upset" because U.S. aircraft had attacked parts of Iraq, he was "upset with the CIA because of their involvement in Muslim countries," and he was concerned with "killing of Pakistanis by U.S. components." When Garrett asked defendant "why he stopped shooting," he replied "there wasn't anybody else left to shoot." When asked about the gender of those shot, defendant replied "that he only shot males because it would be against his religion to shoot females."

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE VIRGINIA SUPREME COURT CORRECTLY RULED THAT THE FOURTH AMENDMENT DID NOT APPLY TO PETITIONER BECAUSE AT THE TIME OF THE CHALLENGED SEIZURE HE WAS A NON-RESIDENT ALIEN WHO HAD FLED THE UNITED STATES MORE THAN FOUR YEARS PREVIOUS IN ORDER TO ESCAPE PROSECUTION FOR THE MURDER OF UNITED STATES CITIZENS.

Petitioner contends that this Court should grant certiorari to resolve an alleged "conflict" between the Virginia Supreme Court's ruling in his case and the decisions

of the Florida Supreme Court in *Reichmann v. State*, 581 So.2d 133 (Fla. 1991), and the United States Court of Appeals for the Ninth Circuit in *United States v. Juda*, 46 F.3d 961 (9th Cir. 1995). According to Kasi, the supposed "conflict" to be resolved involves the issue of whether an alien has "standing" to challenge his seizure abroad if at one time he had substantial voluntary connections to the United States. (Ptn. 12-16). Petitioner's contention is baseless, however, because his case is nothing like either *Reichmann* or *Juda*, and the Virginia Supreme Court's decision in his case is entirely consistent with this Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Contrary to Kasi's allegation, the state court did ***not*** rule that he had no "standing" to raise a Fourth Amendment claim challenging his seizure in Pakistan. (Ptn. 12). What the Virginia Supreme Court ruled was that, under *Verdugo-Urquidez*, the Fourth Amendment simply did not apply given the particular facts surrounding his seizure. *See Kasi*, 508 S.E.2d at 63. (Ptn. App. 12). That conclusion was undeniably correct and does not warrant this Court's review. *See* Rule 10 ("certiorari will be granted only for compelling reasons").

In *Verdugo-Urquidez*, this Court held:

> The available historical data shows . . . that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.

> There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory. . . .

494 U.S. at 266-267. According to Kasi, *Verdugo-Urquidez* is not dispositive here because, ***at the time of the crime in January of 1993***, he had "lived, worked, held a driver's license, maintained car insurance, invested in business, and participated in civic and religious activities in the United States as a legal alien for approximately two years." (Ptn. 15-16). This argument, however, completely misunderstands *Verdugo-Urquidez'* discussion of whether an "alien" might qualify as one of "the people" contemplated by the Fourth Amendment – a discussion which focused solely upon government actions ***in the United States*** against "resident aliens." *See* 494 U.S. at 270-271.

Here, the undisputed facts are that, when Kasi was seized by the FBI in Pakistan, he was a non-resident alien who had fled the United States in January of 1993 to escape prosecution for the murder of United States citizens, and had not returned to this country at any time during the more than four years before he was captured.[2] Kasi's focus on his alleged ties to the United States ***at the time of the crime*** is irrelevant. *See Verdugo-Urquidez*, 494 U.S. at 274-275 (Fourth Amendment does not apply

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[2] After a pretrial hearing, the state trial judge found as a matter of fact that Kasi "was last in this country four and a half years before the event that I'm calling the arrest. He's not a U.S. citizen. There's no evidence he had any contact with the United States in the intervening period of time and the arrest occurred in a foreign country." (Ptn. App. 48-49).

because "***[a]t the time of the search,*** [the defendant] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was in Mexico") (emphasis added).

The Virginia Supreme Court's fact-specific application of *Verdugo-Urquidez* certainly is not in "conflict" with either *Reichmann* or *Juda*. In *Reichmann*, the Florida Supreme Court merely found that the Fourth Amendment applied to a German citizen who was challenging the validity of a search conducted in Germany shortly after he was arrested in Florida for murder. At the time of both his arrest and the seizure, the defendant was an alien ***residing in Florida***. *See Reichmann*, 581 So.2d at 135, 138.

The Ninth Circuit's decision in *Juda* is similarly inapposite. The only tangentially relevant ruling by the Court of Appeals in *Juda* was that "the Fourth Amendment's reasonableness standard applies to United States officials conducting a search affecting ***a United States citizen*** in a foreign country." *See Juda*, 46 F.3d at 968 (emphasis added). Kasi, of course, is not a United States citizen. The district court decision in *Juda* is likewise inapposite. There, the ruling upon which petitioner relies concerned an "investigation . . . directed against United States citizens or residents." *See United States v. Juda*, 797 F. Supp. 774, 781-782 (N.D. Cal. 1992). Once again, under *Verdugo-Urquidez*, it is the defendant's status at the time of the seizure that controls and, at the time of the petitioner's seizure by the FBI, he was neither a citizen nor a resident of the United States.

Petitioner's reliance upon *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995), also is misplaced. (Ptn. 13-14).

Indeed, *Barona* expressly acknowledges that what controls under *Verdugo-Urquidez* is the defendant's status "at the time of the extraterritorial search." *See Barona*, 56 F.3d at 1094. Moreover, the issue which *Barona* states that *Verdugo-Urquidez* left undecided is "whether ***a resident alien*** has undertaken sufficient obligations of citizenship or has 'otherwise developed sufficient connection with this country' " to be protected by the Fourth Amendment. *Id.* (emphasis added). That issue has absolutely nothing to do with Kasi because, at the time of his seizure in Pakistan, he had fled the United States more than four years previous in order to escape prosecution for murder and unquestionably had abandoned whatever connection to this country he ever had.

II. THE COURT BELOW CORRECTLY APPLIED *ALVAREZ-MACHAIN* AND CONCLUDED THAT THE TRIAL COURT WAS NOT DEPRIVED OF JURISDICTION OVER PETITIONER BY VIRTUE OF THE MANNER IN WHICH HE WAS SEIZED AND BROUGHT TO THE UNITED STATES.

The Virginia Supreme Court's opinion demonstrates that it correctly stated the rule established by this Court in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), and faithfully applied that rule to the particular facts of petitioner's case. *See Kasi*, 508 S.E.2d at 63. (Ptn. App. 10-12). There is, therefore, no "compelling reason" warranting certiorari review. *See* Rule 10 ("certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

In *Alvarez-Machain*, this Court held that "a criminal defendant, abducted to the United States from a nation

with which it has an extradition treaty" does not acquire "a defense to the jurisdiction of this country's courts." *See* 504 U.S. at 657. The Virginia Supreme Court concluded that in petitioner's case, just as in *Alvarez-Machain* and *Ker v. Illinois*, 119 U.S. 436 (1886), the "defendant's seizure in a foreign country and his return to this country were not accomplished pursuant to an extradition treaty." *See Kasi*, 508 S.E.2d at 63. (Ptn. App. 11). Thus, the state court correctly reasoned that, under *Alvarez-Machain*, Kasi's claim could succeed only if an extradition treaty between the United States and Pakistan can be construed to prohibit "forcible abduction of people from the territory of the other nation" and to delineate "the consequences . . . if such an abduction occurs." *See Alvarez-Machain*, 504 U.S. at 662-663.

There is no extradition treaty directly between the United States and Pakistan. Kasi relies upon the 1935 treaty between this country and the United Kingdom. (Ptn. App. 71-86). Assuming, but not conceding, that this treaty applies to this case, it clearly does not prohibit the type of non-treaty seizure conducted by the FBI, any more than the extradition treaty between the United States and Mexico prohibited the abduction that occurred in *Alvarez-Machain*. *See* 504 U.S. at 664 (the treaty "does not purport to specify the only way in which one country may gain custody of a national of the other country for purposes of prosecution").

Kasi relies upon Article 8 of the United States-United Kingdom treaty. (Ptn. App. 76). That provision, by its express terms, clearly applies only to an "extradition" accomplished "under the provisions of this treaty." Kasi, however, was not "extradited" to the United States, his

return clearly was not accomplished "under the provisions of" an extradition treaty, and the treaty process simply never was invoked.[3] *See Alvarez-Machain*, 504 U.S. at 665 (explaining that an extradition treaty establishes "the procedure to be followed ***when the Treaty is invoked***") (emphasis added). The dispositive fact is that the treaty upon which Kasi relies "does not prohibit [his] abduction." *Id.* at 662. The court below, therefore, correctly rejected his jurisdictional challenge.

III. THERE WAS NO "VIENNA CONVENTION" VIOLATION IN PETITIONER'S CASE AND, EVEN IF THERE WERE, THERE WOULD BE NO CONSTITUTIONAL BASIS FOR REQUIRING THE SUPPRESSION OF HIS CONFESSION IN A STATE CRIMINAL TRIAL.

Petitioner contends that the FBI failed to advise him upon his seizure in Pakistan that he had the right under Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), 21 U.S.T. 77, T.I.A.S. No. 6820 (Apr. 24, 1963), to contact the Pakistani consulate and, therefore, his confession to the FBI while en route to the United States should have been suppressed.[4] The Vienna

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[3] Indeed, on page 10 of Kasi's "opening brief" in the Virginia Supreme Court, he conceded: "The record is silent as to any request by any United States diplomat for the extradition of Kasi or his arrest by Pakistani authorities pursuant to the [extradition] treaty. . . . This abduction/seizure of Kasi was conducted . . . without invoking the procedures set out by the laws of each country." (Resp. App. 1-2).

[4] Kasi misstates the record when he asserts that "[o]ther than the statement given by petitioner after he was abducted by

Convention has no application under the particular facts of Kasi's case and, in any event, petitioner failed to make the required showing of "prejudice." A purported Vienna Convention violation, moreover, provides no constitutional basis for mandating an exclusionary rule in a state criminal proceeding.

As the Virginia Supreme Court found, after Kasi was seized by the FBI in Pakistan, he was taken "to a 'holding facility' where he ***was turned over to Pakistani authorities***" before he ultimately " 'was allowed to be released' from the facility in the custody of the FBI agents" and transported by airplane to the United States. *See Kasi*, 508 S.E.2d at 61 (emphasis added). (Ptn. App. 6). It was in this context that, when the Supreme Court of Virginia rejected Kasi's "Vienna Convention" claim, it concluded, "[I]t makes no sense to say that, when the defendant was arrested in Pakistan and turned over to Pakistani authorities, the Vienna Convention required defendant to be notified of his right to contact Pakistani consular officers, even if that country maintained a 'consulate' within its own borders." *See Kasi*, 508 S.E.2d at 64. (Ptn. App. 13).

The Vienna Convention has no application in the rare situation, like petitioner's, where a person is apprehended ***in his own country*** by agents of another country.

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the four FBI agents in Pakistan, no direct evidence placed the petitioner at the murder scene." (Ptn. 8). Angela Clark was an eyewitness to the shootings and she unequivocally identified Kasi as the gunman. (Resp. App. 2-3). *See Kasi*, 508 S.E.2d at 59 ("The gunman later identified as defendant . . . fled the scene"). (Ptn. App. 1). The record, moreover, is replete with Kasi's admissions that he was the shooter. (Resp. App. 4-6).

The treaty clearly contemplates situations where a foreign national of country A is arrested in country B, and requires the officials of country B to notify the arrestee that he may contact the local consulate of country A. As the Virginia Supreme Court concluded, it simply would have made no sense to require the FBI agents to inform Kasi that he had the right to contact the Pakistani "consulate," particularly where it is clear that at one point he was in Pakistani custody.[5] *See Kasi*, 508 S.E.2d at 64. (Ptn. App. 13).

In *Breard v. Greene*, 118 S.Ct. 1352, 1355 (1998), moreover, this Court held that "it is extremely doubtful that [a Vienna Convention] violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." The Court then rejected Breard's assertion that he was prejudiced by the treaty violation in his case because, if he had consulted with consular officials, "he [allegedly] would have accepted the State's offer to forgo the death penalty in return for a plea of guilty" – an assertion which this Court labeled "far more speculative than the claims of prejudice courts routinely reject." *Id.*

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[5] Kasi suggests that this Court should grant certiorari to review the Virginia Supreme Court's allegedly "erroneous" factual finding that, after seizing Kasi, the FBI temporarily relinquished custody to the Pakistani authorities. (Ptn. 18). Certiorari, however, "is rarely granted when the asserted error consists of erroneous factual findings. . . . " Rule 10. In any event, the record shows that Kasi expressly conceded in the state trial court that, after the FBI seized him in Pakistan, he temporarily was "put into Pakistani custody" and "given over to the government of Pakistan." (Ptn. App. 341).

In light of *Breard*, the Virginia Supreme Court correctly rejected Kasi's nonsensical assertion that, despite the fact that the Pakistani authorities clearly knew of and acquiesced in Kasi's seizure in Pakistan by the FBI and, even though Kasi was advised of and validly waived his *Miranda* rights, he nevertheless would not have confessed if only he had been told he could contact the Pakistani consulate. *See Kasi*, 508 S.E.2d at 64 ("defendant's suggestion . . . is just as speculative as the theory of 'prejudice' that the Supreme Court recently rejected in *Breard*"). (Ptn. App. 13). Indeed, there is absolutely no reason to believe that, if petitioner had been advised that he could contact the Pakistani consulate, he would have attempted to do so under the circumstances or that, even if he had made such contact, any assistance would have been forthcoming from the Pakistani authorities.[6] Nor is there any reason to believe that any contact with a Pakistani consulate would have provided Kasi with any information relevant to his right not to incriminate himself beyond what he was provided by the *Miranda* warnings, or would have caused him to invoke rather than waive his *Miranda* rights.

Finally, there simply is no authority for the proposition that a purported violation of the Vienna Convention provides a valid basis for an exclusionary rule created by

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[6] While Article 36 of the Vienna Convention requires the arresting authorities to inform a foreign national that he may contact the consulate of his country and that, if the foreign national indicates he wishes to make such contact, the arresting authorities must notify the consulate, nothing in the applicable provisions of the treaty requires that, once notified, the consular authorities must provide assistance. (Ptn. App. 100-102).

the federal judiciary and made applicable in a state criminal proceeding.[7] Petitioner's confession to the FBI was preceded by full *Miranda* warnings and a written waiver of his constitutional rights. In the court below, Kasi challenged the admissibility of his confession on Fifth Amendment grounds, and the Virginia Supreme Court rejected the claim as follows:

> First, defendant claims the statement was involuntary and was obtained through coercion. We do not agree.
>
> The evidence on the issue, presented both at a pretrial suppression hearing and during the guilt phase of the trial, was overwhelming and uncontradicted that defendant validly waived any constitutional rights he may have had in connection with the statement and that the statement was voluntary. No threats or promises were made to defendant, either when he was apprehended or aboard the aircraft, and he was

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[7] In cases involving the criminal prosecution of ***federal*** defendants, the few lower federal courts that have addressed the issue have been unanimous in holding that a purported Vienna Convention violation cannot possibly require the suppression of statements to the police without a showing of "prejudice." *See, e.g., United States v. Lombera-Camorlinga*, 170 F.3d 1241, 1244 (9th Cir. 1999); *United States v. Chen*, ___ F. Supp. 2d ___, 1999 U.S. Dist. LEXIS 5728, *12-14 (S.D. N.Y. 1999); *United States v. Tapia-Mendoza*, ___ F. Supp. 2d ___, 1999 U.S. Dist LEXIS 2852, *9-13 (D. Utah 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1999 U.S. Dist. LEXIS 2640, *9-12 (C.D. Ill. 1999); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998). None of these cases, of course, deals with the issue of whether, absent a ***constitutional*** violation, the federal courts may create and enforce an exclusionary rule with respect to a ***state*** criminal proceeding.

> not offered anything in return for his statement. Defendant, who "had good command of the English language," told Garrett that he "understood his rights fully and completely." He never refused to answer any question, and at no time during the 12-hour return flight did he express any fear or indicate he was making a statement because he was afraid. There is no evidence of coercion while he was detained in Pakistan. Indeed, the FBI agents were careful to assure he was treated humanely. The trial court's detailed findings of fact that the waiver was knowing, voluntary, and intelligent and that the statement was voluntary are fully supported by the record.

Kasi, 508 S.E.2d at 62. (Ptn. App. 8). Given the state court's rejection of petitioner's constitutional claim, a ruling which Kasi does not challenge in his certiorari petition, it is beyond question that the admission of his confession did not violate the Constitution.

As *Breard* makes clear, a purported treaty violation is not of ***constitutional*** magnitude, but rather "is on a full parity" with "an Act of Congress." *See Breard*, 118 S.Ct. at 1355; *see also Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir.) ("Although states may have an obligation under the Supremacy Clause to comply with . . . the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions. . . . into violations of ***constitutional*** rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty"), *cert. denied*, 521 U.S. 1144 (1997); *Esparza-Ponce*, 7 F. Supp. 2d at 1097 ("a violation of the Convention does not rise to the level of a *Miranda* violation").

Miranda's judicially-created exclusionary rule is warranted only because it is designed to safeguard ***constitutional*** rights. *See generally Withrow v. Williams*, 507 U.S. 680, 691 (1993) ("*Miranda* safeguards 'a fundamental trial right' "); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (*Miranda* rights are "not themselves rights protected by the Constitution, but [are] measures to insure that the right against compulsory self-incrimination [is] protected"). Because Kasi's confession was obtained by the FBI in full compliance with the Constitution and *Miranda*'s prophylactic rule, his treaty-based claim cannot support an exclusionary rule created and enforced by the federal courts for the benefit of a state criminal defendant.[8] *See United States v. $69,530*, 22 F. Supp. 2d 587, 595 (W.D. Texas 1998) ("The 'judicially created remedy' of exclusion of evidence obtained in violation of the Constitution has never been applied to violations of the Vienna Convention. . . . The exclusionary rule is designed to protect core constitutional values; it should only be employed when those values are implicated").

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[8] The Vienna Convention neither expressly nor implicitly provides for such an exclusionary rule. (Ptn. App. 101-102). *See United States v. Adamaj*, 170 F.3d 58, 67 (1st Cir. 1999) ("the Vienna Convention itself prescribes no judicial remedy or other recourse for its violation, let alone vacatur of a conviction"). Indeed, the preamble to the treaty expressly recognizes that "the purpose" of the "privileges and immunities" provided by the treaty "is ***not to benefit individuals*** but to ensure the efficient performance of functions by consular posts on behalf of their respective states." (Ptn. App. 100, emphasis added).

IV. PETITIONER DID NOT RAISE HIS SO-CALLED *"TOUHY"* CLAIM IN THE VIRGINIA SUPREME COURT.

Kasi asks this Court to review his claim that the trial court's failure to compel the FBI and the CIA to produce documents denied him his "constitutional rights to exculpatory and mitigating evidence." (Ptn. 21). According to petitioner, this Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), does not mean that a state court cannot compel a federal agency to produce documents. He argues that the state trial court's conclusion that it could not hold the FBI or the CIA in contempt for failure to provide documents pursuant to a subpoena deprived him of potential exculpatory or mitigating evidence. No such claim, however, was raised in the court below and, therefore, certiorari review is barred. *See Yee v. Escondido*, 503 U.S. 519, 533 (1992); Rule 14.1(g)(i) (requiring petitioner to specify when and how federal claim was raised in state court).

Petitioner filed 92 assignments of error in the Virginia Supreme Court and purported to raise all but one of them in his appellate brief. *See Kasi*, 508 S.E.2d at 60. (Ptn. App. 4). The only assignment of error, however, that even remotely relates to the claim he has raised in his certiorari petition was assignment no. 2 which alleged that the state trial court "erred in not holding the CIA in contempt for failure to respond to a valid subpoena." (Resp. App. 1). No mention was made of the FBI, no attempt was made to couch Kasi's claim in constitutional terms, no assertion was made that the trial judge had concluded he lacked

the authority to hold the CIA in contempt, and no allegation was raised regarding either "exculpatory" or "mitigating" evidence.

In his appellate brief, Kasi's assignment of error received only the following cursory treatment which was relegated to a footnote: "Error is assigned to the trial court's failure to hold the CIA in contempt for its failure to respond to a valid subpoena duces tecum." (Resp. App. 1). Again, no mention was made of the FBI or the trial court's authority (as opposed to its "failure") to hold the CIA in contempt. And, although Kasi did mention the Constitution in a perfunctory manner, he did not refer to either a due process right to disclosure of exculpatory evidence or an Eighth Amendment right to present mitigating evidence. Instead, he referred only in conclusory fashion to the Sixth Amendment rights to call for evidence in his favor and to confront his accuser. (Resp. App. 1). The Virginia Supreme Court disposed of assignment of error no. 2 as one of a group of claims upon which Kasi "effectively presented no meaningful argument" and which the Court found to have "no merit." *See Kasi*, 508 S.E.2d at 60. (Ptn. App. 4).

Under well-established rules of Virginia appellate procedure, the Virginia Supreme Court will not review on appeal any claim that is not encompassed by an assignment of error. *See Sheppard v. Commonwealth*, 464 S.E.2d 131, 135 (Va. 1995) (refusing to decide any claim not encompassed by "the original assignments of error"), *cert. denied*, 517 U.S. 1110 (1996). Because Kasi's assignment of error no. 2 in the court below failed to raise a constitutional claim and does not even remotely resemble the claim he has raised in his certiorari petition, the latter is

not properly before this Court.[9] *See Yee*, 503 U.S. at 533; Rule 14.1(g)(i).

Kasi devotes nearly a third of his petition to an exposition of this Court's decision in *Touhy*,[10] a survey of the lower federal courts' allegedly unwarranted "expansion" of that ruling, and an argument why his case supposedly is an appropriate vehicle for clarifying the *Touhy* rule. (Ptn. 21-30). ***Nowhere in petitioner's brief in the Virginia Supreme Court, however, did he cite or even obliquely refer to*** *Touhy*. Indeed, to the limited extent Kasi even mentioned his claim in a footnote to his brief, he failed to cite ***any*** case authority in support of it. (Resp. App. 1).

Under these circumstances, regardless of what this Court ruled in *Touhy* or how that ruling has been interpreted and applied by the lower federal courts, it is nothing short of frivolous to suggest that the Virginia Supreme Court's ***judgment*** in Kasi's case provides an appropriate vehicle for reviewing his newly-minted *"Touhy"* claim. *See Black v. Cutter Laboratories*, 351 U.S.

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[9] Therefore, the Virginia Supreme Court's "no merit" ruling necessarily was restricted to the conclusory, non-constitutional claim relating solely to the CIA which was raised in Kasi's assignment of error. This Court does not have jurisdiction to review such a non-constitutional claim. *See generally Mansell v. Mansell*, 490 U.S. 581, 587 (1989) (noting that this Court has no jurisdiction over matters of state law).

[10] Kasi inaccurately asserts that *Touhy* dealt with the power of a ***state*** court to hold a federal agency in contempt. (Ptn. 22). *Touhy* dealt with the power of a ***federal district court*** to hold a federal agency in contempt in connection with a habeas corpus proceeding involving a state prisoner. *See Touhy*, 340 U.S. at 464.

293, 297-298 (1956) (purpose of certiorari is to review "judgments"). It simply is impossible to conclude that the Virginia Supreme Court's decision has anything to do with the elaborate constitutional claim Kasi has constructed in his certiorari petition.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Commonwealth of Virginia

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[11] In any event, the "factual" predicate for petitioner's claim that he somehow was deprived of information to which he was constitutionally entitled is based upon his assertions that "the CIA, through . . . Pakistan's intelligence . . . and national security service, sought the aid and assistance of the petitioner and members of his family" during the war in Afghanistan and that "the CIA is believed to be responsible" for the killing of one of petitioner's relatives after that war. (Ptn. 6-7). As support for these assertions, however, he cites only a newspaper article which expressly was based upon mere speculation. (Ptn. App. 483: "Some press accounts have alleged that . . . " and "local reports subsequently speculated that . . . "). Thus, even if Kasi's claim were not defaulted, he clearly has presented no compelling reason warranting certiorari review.

RESPONDENT'S APPENDIX

EXCERPT FROM PETITIONER'S ASSIGNMENTS OF ERROR FILED IN VIRGINIA SUPREME COURT ON MAY 1, 1998:

ASSIGNMENTS OF ERROR

* * *

2. The Circuit Court erred in not holding the CIA in contempt for failure to respond to a valid subpoena.

EXCERPTS FROM PETITIONER'S VIRGINIA SUPREME COURT BRIEF IN *KASI V. COMMONWEALTH*:

[p. 3, fn. 2]

Error is also assigned to the trial court's failure to hold the CIA in contempt for its failure to respond to a valid subpoena duces tecum; there was no attempt to determine what authority the court might have and to use it to ensure that this defendant would be able to "call for evidence in his favor" and confront his accuser in accordance with the United States and Virginia Constitutions.

[p. 10]

The record is silent as to any request by any United States diplomat for the extradition of Kasi or his arrest by Pakistani authorities pursuant to the treaty or any "such other manner" or understanding between the two nations. There is further no record of the assent of Pakistan to this method of arrest.

This abduction/seizure of Kasi was conducted outside and in express violation of the Extradition Treaty

between the United States and Pakistan and without invoking the procedures set out by the laws of each country;

EXCERPT FROM TRANSCRIPT OF TRIAL TESTIMONY OF ANGELA CLARK ON NOVEMBER 5, 1997:

[p. 63]

ANGELA CLARK

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q. State your full name, please, for the record.

A. Angela Clark.

[pp. 65-66]

Q. Now, was anyone with you in your car that morning?

A. No.

Q. And as you were stopped at that light, did anything unusual occur?

A. Yes. I noticed – when a car pulled up almost directly beside me – I noticed a man get out of that car,

open his car door and get out, with a gun. I then noticed him raising the gun and shooting through the back window of the vehicle in front of me. He then proceeded up the line of cars and between those cars, shooting, and then back down the line of cars, continuing to shoot. He then got back to his car and drove away from the scene.

Q. Did you get a look at that man?

A. Yes, I did.

Q. Was there anything that interfered with your ability to see him and see his face?

A. No, other than the fact that he was wearing glasses at the time.

Q. Do you think you would recognize him if you saw him again?

A. Yes, I do.

Q. Do you see him in this courtroom?

A. Yes.

Q. Would you point him out, please?

A. (Indicating.)

MR. HORAN: Let the record show that she identified the Defendant.

THE COURT: Yes.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY OF DR. NEIL BLUMBERG ON NOVEMBER 12, 1997:

[p. 204]

NEIL BLUMBERG, M.D.

a witness, was called for examination by counsel on behalf of the Defendant, and, after having been duly sworn by the Clerk of this Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MS. BARGER

Q. Can you please introduce yourselves [sic] to the jury and spell your last name for the court reporter?

A. My name is Neil Blumberg, B-L-U-M-B-E-R-G.

CROSS EXAMINATION

[pp. 269-271]

Q. Did he tell you that on the day he did this, he was torn between whether he should shoot up the Israeli Embassy or the CIA?

A. He didn't tell me that on the day that he did this he was torn up. However, he certainly did, prior to making the decision to go to the CIA, considered shooting up the Israeli Embassy.

Q. Did he tell you that the reason he picked the CIA rather than the Israeli Embassy is he figured the CIA employees wouldn't be armed?

A. Yes, that's what he told me.

* * *

Q. He pulled up behind the right-hand lane of vehicles and got them while they were sitting in their cars at the light.

A. Yes.

Q. And that's what he told you?

A. That among many other things, yes.

Q. And he told you he shot five or six people?

A. Yes.

Q. He told you he fired ten to fifteen rounds?

A. I don't recall off-hand how many rounds he told me that he fired. What he told me is that he kept shooting until there was nobody else around to shoot at.

TRANSCRIPT OF PETITIONER'S ALLOCUTION ON JANUARY 23, 1998:

[pp. 17-18]

THE COURT: Is there anything you want to say?

THE DEFENDANT: I condemn the American government for the taking Islamic countries again and again and killing innocent people there and imposing economic sanctions on Islamic countries directly and through the United Nations to damage the economies of Islamic countries. And the CIA attack is the result of the

wrong policy of the American government towards Muslims, and I don't feel proud for it, and I have not told anybody I feel proud for it.

THE COURT: Is there any reason I should not sentence you today?

THE DEFENDANT: Regarding the CIA incident, I don't expect justice from the courts of this country because it was – it is the result of the wrong policy of the American government towards Muslims.

Supreme Court, U.S.
FILED
JUN 8 1999
CLERK

(6)

No. 98-1812

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MIR AIMAL KASI

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

On Petition for a Writ of Certiorari to the

Supreme Court of Virginia

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITIONER'S REPLY BRIEF

The Court has jurisdiction to issue certiorari to the Supreme Court of Virginia on petitioner's Question 4. This Reply is necessary because respondent incorrectly contends in its Brief in Opposition that petitioner waived his claim underlying Question 4 by inadequately presenting it in his appellate brief to the Virginia Supreme Court. Respondent's Brief in Opposition at 20-21. Respondent also states that in any event, petitioner waived his claim with respect to the Federal Bureau of Investigations ("FBI"). Id. at 19-20.

Contrary to respondent's assertions, the federal question presented by petitioner's Question 4 was ***ruled upon*** by the Virginia Supreme Court. Respondent argued to the Virginia Supreme Court that petitioner had waived review of the claim presented by Question 4, Supplemental Appendix at 2-3, but the court rejected respondent's waiver argument and held:

> "We have considered these so-called arguments [Assignments of Error Numbers 2 and 73] and find no merit in...them."
>
> Appendix at 4, ¶ 2.[1]

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[1] Compare Appendix at 4, ¶ 1 (the court addressing other arguments raised by petitioner ruled "[petitioner] assigned 92 errors allegedly committed by the trial court...and has not argued many of them...; hence, they are waived and will not be

The Virginia Supreme Court's ruling addressed the trial court's orders with regard to documents held by ***both*** the CIA and the FBI. Appendix at 4, ¶ 2; see also Assignments of Error Numbers 2, 3, 30, 73 and 88 at Supplemental Appendix at 1. Petitioner's Assignments of Error Number 73 states: "The [trial court] erred in denying [petitioner's] motion to compel discovery when the material in the custody of agents of the Federal Government and the Commonwealth's Attorney did not even attempt to investigate what that evidence was since these Federal Agents stated the information was classified and confidential." Supplemental Appendix at 9.

Admittedly, petitioner's assignments of error and accompanying argument are not elaborate. Nor need they be. Beck v. Alabama, 447 U.S. 625, 630-631, n. 6 (1979); see Lebron v. National R.R. Corp., 513 U.S. 374, 379 (1995) ("[o]ur practice 'permit[s] review of an issue not pressed so long as it has been passed upon....' ", quoting United States v. Williams, 504 U.S. 36, 41 (1992)). However, the record from the trial court—also before the Virginia Supreme Court—clears any ambiguity and shows that the constitutional question at stake in Question 4 was directly and vehemently contested. See Appendix at 67 ("I don't find there's any jurisdiction of a state court to hold a federal official in contempt for failing to respond to a state court's subpoena"), 362-385, 399-422. Because the record shows ample factual and legal debate on the federal issue presented in Question 4, the Virginia

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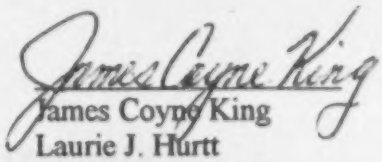
considered"). Assignments of Error Numbers 2 and 73 were not among the errors waived.

Supreme Court was able to, and this Court can and should, fully consider the issue. See Illinois v. Gates, 462 U.S. 213, 223 (1983) (existence of adversarial dispute in record indicates that appellate court's decision on federal question is informed).

Wherefore, petitioner respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX
SUPPLEMENTAL APPENDICES A AND B

SUPPLEMENTAL APPENDICES

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX A

Excerpt from Opening Brief of Appellant submitted by Petitioner to the Virginia Supreme Court dated July 2, 1998: Assignments of Error 1

SUPPLEMENTAL APPENDIX B

Excerpt from Brief of the Commonwealth submitted by Respondent to the Virginia Supreme Court dated August 12, 1998 [Pages 10-11] 2

SUPPLEMENTAL APPENDIX A

Excerpt from Opening Brief of Appellant submitted by Petitioner to the Virginia Supreme Court dated July 2, 1998:

ASSIGNMENTS OF ERROR

....

2. The Circuit Court erred in not holding the CIA in contempt for failure to respond to a valid subpoena.

3. The Circuit Court erred in forbidding certain questions at the 20 October 1997 suppression hearing as to the involvement in the forcible abduction by foreign nationals.

....

30. The Circuit Court erred in refusing to permit counsel for Kasi to examine the notes Agent Garrett used to refresh his recollection prior to his testimony.

....

73. The Circuit Court erred in denying defendant Kasi's motion to compel discovery when the material in the custody of agents of the Federal Government and the Commonwealth's Attorney did not even attempt to investigate what that evidence was since these Federal agents stated the information was classified and confidential.

....

88. The Circuit Court erred in not holding that the Commonwealth had duty to give notice in advance of the existence of certain classified information prior to the 27 October 1997 hearing on the motion to suppress.

SUPPLEMENTAL APPENDIX B

Excerpt from Brief of the Commonwealth submitted by Respondent to the Virginia Supreme Court dated August 12, 1998:

[Pages 10-11]

II. KASI HAS WAIVED ALL OF THE ASSIGNMENTS OF ERROR THAT HE HAS FAILED TO BRIEF

An appellant waives any assignment of error that he fails to brief in a meaningful fashion. See Barnabei v. Commonwealth, 252 Va. 161, 165 n.1, 477 S.E.2d 270, 272 n.1 (1996), cert. denied, 117 S.Ct. 1724 (1997); Rule 5:27. Kasi has failed to address Assignments of Error 5, 14, 15, 17, 20, 21, 25, 26, 28, 32, 47, 61, 73, 77, 78, 79, 80, 91, and 92 in *any* fashion.[1] Moreover, his brief does no more than simply articulate Assignments of Error 2, 7, 16, 18, 19, 22, 23, 24, 27, 29, 30, 43[2], 45, 51, and 54 in a completely conclusory manner. (Def. Br. 3 n.2; 33 n.29; 41n.35). All of the

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[1] Assignment of Error 91 which Kasi filed in this Court on May 1, 1998, challenged the trial court's decision to permit a camera in the courtroom. Assignment 92 concerned the dismissing of a show cause order against the Immigration and Naturalization Service (INS). In the list of Assignments that Kasi has included in his brief, however, he has dropped the former No. 91 and renumbered the former No. 92 as No. 91. See Sheppard v. Commonwealth, 250 Va. 379, 385, 464 S.E.2d 131, 135 (1995) (improper to change Assignments of Error), cert. denied, 517 U.S. 1110 (1996). In any event, neither claim has been briefed and, therefore, both are waived.

[2] Even if this claim were not defaulted, it has no merit. See Cox v. Commonwealth, 227 Va. 324, 329 n.4, 315 S.E.2d 228, 231 n.4 (1984) (subpoena duces tecum in criminal case does not apply to material in possession of investigating arm of the Commonwealth).

assignments, therefore, are waived by Kasi's failure to present any argument or citation of authority in support of his claims.[3]

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[3] Several of the claims Kasi has failed to brief are doubly defaulted because, even if he had briefed them, he failed to preserve them at trial. For example, with respect to Assignment of Error 15, Kasi expressly stated on the record that he had "no objection" to Detective Miller's testimony as an expert regarding bullets traveling through automobile glass. (App. 3187). Rule 5:25. Likewise defaulted is Assignment 22 because Kasi expressly stated that he had no objection to the admissibility of Commonwealth's Exhibit 32. (App. 3253). Rule 5:25. And, Assignments 14 and 28 are waived because, after Kasi's objections to the documents in question were overruled, he proceeded to elicit information from the same documents which he considered to be favorable to his case. (App. 3156-59, 3404). See generally Hubbard v. Commonwealth, 243 Va. 1, 9, 413 S.E.2d 875, 879 (1992) (objection waived by introducing evidence "of the same character").